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No. 08-770

IN THE
Supreme Court of the United States

DELL MARKETING L.P.
(FORMERLY KNOWN AS DELL CATALOG SALES L.P.),
Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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December 15, 2008

QUESTION PRESENTED

Whether a state may, consistent with the Commerce Clause, impose gross receipts taxes on sales by an out-of-state mail-order vendor with no physical presence in the state based solely on the in-state activities of a third party contractor that provides post-sale services to in-state buyers but that engages in no sales or solicitation activities on behalf of the vendor.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Dell Marketing L.P. (formerly known as Dell Catalog Sales L.P.) states the following:

In November 2006, Dell Catalog Sales L.P. was merged into Dell Marketing L.P. Dell Marketing L.P. is a wholly owned subsidiary of Dell Inc. Dell Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

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Dell Marketing L.P. (formerly known as Dell Catalog Sales L.P.) respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico.

INTRODUCTION

The New Mexico Court of Appeals held that Dell Catalog, an out-of-state computer retailer with no physical presence in New Mexico, was subject to that state's gross receipts tax solely because of the activities of BancTec, a third-party repair provider that independently offered service contracts for the computers that Dell Catalog sold – even though BancTec did not solicit or promote the sales subjected to tax. That decision – which conflicts with decisions of the highest courts of Ohio and Connecticut as well as decisions of at least two intermediate state appellate courts – deepens an existing conflict among the states regarding the federal constitutionality of taxing out-of-state vendors based on activities carried out by non-agent third parties. The decision undermines this Court's long-established – and recently reaffirmed – rule that states lack authority under the Commerce Clause to tax out-of-state mail-order vendors with no physical presence in the state. And the decision sows confusion in an area of the law where this Court has repeatedly held that bright-line rules are needed to avoid burdening interstate commerce.

In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992), this Court held that the Constitution prohibits a state from imposing taxes on sales by an out-of-state mail-order vendor that has contact with the state only through the delivery of its goods by mail or common carrier. Such a vendor lacks the "substan-

tial nexus" with the state needed for state taxation to be consistent with the Commerce Clause. The Court has held that an out-of-state vendor may have such a substantial nexus if the "activities" of an in-state third party are "performed . . . on behalf of the taxpayer" and "are significantly associated with the taxpayer's ability to establish and maintain a market . . . for [its] sales." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 250 (1987) (internal quotation marks omitted).

This Court has never found nexus on the basis of a third-party's *non-sales* activities. Following the logic of this Court's decisions, several states have held that non-sales activities by third parties – such as accepting returns of mail-order products – fail to establish the required nexus to justify state taxation of a mail-order vendor's sales. The court of appeals' decision – joining prior decisions by other intermediate state courts – applies a conflicting rule, under which a third party's activities can establish substantial nexus so long as the out-of-state vendor derived some benefit from the third party's activities.

The division of authority on this important constitutional question warrants this Court's review. The Court has emphasized the need for clear rules governing state taxing authority to ensure that interstate commerce is free of the threat of unconstitutional state taxation. The need for clarity is accentuated by the rapid growth of Internet-based sales and the role that such commerce plays in the national economy. This Court should therefore grant the petition.

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals (Pet. App. 1a-29a) is not reported. The decision and order of the Taxation and Revenue Department of the State of New Mexico (*id.* at 30a-103a) is not reported but is available at 2006 WL 2283430.

JURISDICTION

The New Mexico Court of Appeals entered its judgment on June 3, 2008, and the New Mexico Supreme Court denied a petition for a writ of certiorari on July 18, 2008 (Pet. App. 104a). On October 14, 2008, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including December 15, 2008. *Id.* at 110a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, provides in relevant part:

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States[.]"

Relevant provisions of the Gross Receipts and Compensating Tax Act, N.M. Stat. Ann. § 7-9-1 *et seq.*, are reproduced at Pet. App. 105a-109a.

STATEMENT

1. New Mexico's Gross Receipts and Compensating Tax Act, N.M. Stat. Ann. § 7-9-1 *et seq.*, provides that, "[f]or the privilege of engaging in business" in the state, "an excise tax equal to five percent of gross receipts is imposed on any person engaging in business in New Mexico." *Id.* § 7-9-4(A). The statute defines "gross receipts" to include "the total . . . value of . . . consideration received from selling property in New Mexico." *Id.* § 7-9-3.5(A)(1). Gross receipts taxes are functionally equivalent to sales taxes. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 n.3 (1995).

2. Petitioner Dell Marketing L.P. (formerly known as Dell Catalog Sales L.P.) ("Dell Catalog")[1] is an Internet- and mail-order retailer of computer hardware and accessories. *See* Pet. App. 2a, 32a-33a. Dell Catalog is a Texas limited partnership, and its principal place of business is in Round Rock, Texas. *See id.* at 2a, 32a. As the New Mexico Taxation and Revenue Department ("Department") and the court of appeals found, Dell Catalog "does not own or lease property in New Mexico, has no retail stores within the state, and has no sales agents or employees [in the state]." *Id.* at 2a; *see also id.* at 32a-33a. Dell Catalog does not franchise or license its trade name in New Mexico, *see id.* at 2a, 33a; maintain any "local telephone service with local directory listings" in the state, *id.* at 33a; "maintain any bank accounts or conduct . . . collections" in the state, *id.*; or "drop ship

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[1] Several Dell-related entities have changed their names over the course of the proceedings. Consistent with the opinions below, this petition refers to the relevant entities as they existed during the "audit period" from January 1993 through June 1999. *See* Pet. App. 31a.

goods from manufacturers located in New Mexico," *id.*

Instead, Dell Catalog sold its products during the relevant period solely through a "direct-to-the-customer sales model," *id.* at 2a, in which individual consumers located throughout the United States contacted Dell Catalog in Texas to place an order through the Internet or by electronic mail, telephone, mail, or facsimile, *see id.* at 2a-3a, 33a. Dell Catalog advertised its products through the Internet, national media, and mail-order catalogs. *See id.* at 3a, 33a. When a customer placed an order, Dell Catalog shipped the merchandise from its facilities in Texas or Tennessee directly to the consumer by common carrier or the United States Postal Service. *See id.*; *see also* Dell C.A. Br. 5. The sales contracts between Dell Catalog and its customers specified that title transferred to the customer upon shipment, though Dell Catalog retained the risk of loss until delivery. *See* Pet. App. 3a, 33a-34a.

Dell Catalog resold custom-built computers designed and manufactured by Dell Products L.P., a separate entity that shares a corporate parent with Dell Catalog.[2] *See id.* at 2a, 31a-32a, 33a; *see also* Dell C.A. Br. 5. Dell Catalog purchased the computers from

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[2] Dell Catalog and Dell Products L.P. are both wholly owned by Dell Inc. (known during the relevant time as Dell Computer Corporation). *See* Pet. App. 2a, 31a-32a. Dell Products "engaged in research and development and manufactured computer products." *Id.* at 31a. Those computer products were sold through one of three distinct entities, each of which served a different distribution channel. Dell Catalog served individual consumers, *see id.* at 32a, while Dell Marketing L.P. sold computer products to large enterprises and Dell Direct Sales L.P. sold computer products to small and medium-sized enterprises, *see id.* at 31a.

Dell Products and sold them at retail through the methods described above. *See id.* Dell Catalog also resold "computer peripherals and related accessories" manufactured by "other companies." Pet. App. 33a. Those third-party products included, for example, printers from Epson or Hewlett Packard, or other such items. *See* Dell C.A. Br. 4, 7.

Among the third-party products that Dell Catalog sold were service contracts for on-site repair of Dell computers by a company called BancTec U.S.A., Inc. ("BancTec"). *See* Pet. App. 3a-4a ("[e]ssentially, [Dell Catalog] sold service contracts to its customers who bought computers"), 36a. Dell Catalog began to offer these contracts in response to consumer demand for on-site computer repair beyond the limited warranty that accompanied Dell computers. *See id.* at 3a, 35a-36a.[3] Although the Dell companies considered offering their own service, they ultimately decided that such a business was not within the company's core skills, would require a significant new organizational infrastructure, and would impose significant new liability. *See* Transcript of Hearing Before Hearing Officer Margaret B. Alcock at 87-89, 160-61, *In re Protest of Dell Catalog Sales L.P.*, N.M. ID No. 02-416593-000 (Dec. 5, 2005) ("Tr."). Dell Catalog there-

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[3] Specifically, Dell computers were covered by a "return to factory" warranty from the manufacturer, Dell Products. Under the terms of that warranty – which covered parts and labor for the first year, and parts for the second and third years – the customer was required to return the defective product to Round Rock, Texas, for repair or replacement. *See* Pet. App. 3a, 34a. If the customer was willing to replace a defective part himself, Dell Products would ship the part to the customer with a prepaid return shipping label for return of the defective part. *See id.* at 34a-35a.

fore chose to sell the services of a third-party repair provider. *See* Pet. App. 35a.

After several unsatisfactory experiences with third parties, Dell entered into an arrangement to resell service plans provided by BancTec. *See id.* at 35a-36a. BancTec is a Delaware corporation, and its principal place of business is in Dallas, Texas. *See id.* at 4a, 36a. BancTec was completely separate from Dell Catalog; neither company had any ownership interest in the other. *See id.* BancTec provides on-site repair services for many manufacturers' computer products and for other electronic equipment. *See* Tr. 149-50.

The relationship between BancTec and Dell Catalog was set forth in a series of agreements between the two companies. *See* Pet. App. 36a. Under the terms of those agreements, Dell Catalog would sell the service contracts at a retail price that it was free to determine and would retain the difference between the retail price at which it sold the contracts to customers and the wholesale price at which it compensated BancTec. *See id.* at 35a, 37a. BancTec was paid a fee for each contract based on an agreed-upon formula. *See id.* Dell Catalog set quality-assurance standards that BancTec was required to meet, *see id.* at 5a-6a, 41a, to ensure that BancTec's service, like the other third-party products that Dell Catalog sold, would not damage Dell's reputation. Dell Catalog reported and paid New Mexico gross receipts taxes on BancTec's behalf for the value of the service contracts. *See id.* at 6a, 37a.[4]

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[4] BancTec had a physical presence in New Mexico through its on-site repair employees, offices, and associated infrastructure.

Customers could purchase a BancTec service contract from Dell Catalog when they bought their computers, or at any time thereafter. *See id.* at 38a. Those customers entered into a separate "service contract[]" with BancTec. *Id.* The contract required customers who encountered problems with their Dell computers first to contact Dell Customer Technical Support ("Dell Tech Support").[5] If Dell Tech Support could not resolve the problem over the telephone, Dell Tech Support referred the problem to BancTec so that BancTec could dispatch a repair employee to the customer's premises. *See id.* at 4a, 39a. Although BancTec's agreements with Dell Catalog required that BancTec meet certain performance standards – such as "contact[ing] the customer within thirty minutes of the notice of dispatch, track[ing] every service call, and train[ing] its technicians to meet a certain skill level," *id.* at 5a – the effective provision of on-site repair service was solely BancTec's responsibility. BancTec, for example, was responsible for any property damage that occurred during a service call. *See id.* at 37a. BancTec employees identified themselves as such, and BancTec retained complete discretion over scheduling and personnel matters, and insured its own activities. *See* Dell C.A. Br. 10. BancTec engaged only in on-site repair activities pursuant to its contracts with customers. As the Department found, "BancTec *did not solicit sales or orders on behalf of [Dell Catalog]* or have the authority to bind [Dell Catalog] to any legal obligations in New Mexico." Pet. App. 36a-37a (emphasis added).

Approximately 75 percent of Dell Catalog's computer customers in New Mexico also purchased a BancTec

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[5] Dell Customer Technical Support was located entirely outside of New Mexico. *See* Pet. App. 39a.

service contract, *see id.* at 5a, 38a, and BancTec completed 1,273 service calls in the state during the relevant period, *see id.* at 39a.

3. In July 1999, the Department audited Dell Catalog and determined that it had not reported or paid gross receipts taxes on its sales of computers to New Mexico residents. *See* Pet. App. 6a, 42a-43a. The Department assessed $1,140,735.71 in gross receipts tax and a total tax of $1,817,693.43 including penalties and interest. *See id.* at 6a, 43a.[6]

As relevant here,[7] Dell Catalog protested the assessment on the ground that the state lacked authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, to levy the gross receipts and compensating taxes. As an out-of-state mail-order vendor, Dell Catalog did not possess the requisite "substantial nexus" with the taxing jurisdiction that this Court has required for a tax on interstate commerce to pass muster under the Commerce Clause. Specifically, Dell Catalog argued that it did not have any physical presence in New Mexico, therefore bringing it within the "bright-line" rule of *Quill* and *Bellas Hess*. Dell Catalog argued further that the on-site repair activities of BancTec could not be imputed to Dell Catalog because BancTec neither acted on behalf of Dell

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[6] The amount included $31,908.69 in compensating taxes for the value of the advertising materials that Dell distributed in New Mexico. *See* N.M. Stat. Ann. § 7-9-7. Those taxes were unconstitutionally imposed for substantially the same reasons that the gross receipts taxes were unconstitutionally imposed.

[7] Dell Catalog also argued that the Gross Receipts and Compensating Tax Act did not authorize the Department to collect the assessed taxes because Dell was not "selling property in New Mexico" within the meaning of New Mexico Stat. Ann. § 7-9-3.5(A) [illegible].

Catalog in undertaking its own contractual obligations to its customers nor engaged in the solicitation of sales that would help to maintain a market for Dell computers.

Following a formal hearing before a Department hearing officer, the Department affirmed the assessment.[8] The hearing officer concluded that the taxes were constitutional because Dell Catalog exerted substantial control over BancTec's activities through the provisions of its agreements with BancTec, *see* Pet. App. 68a-72a, and BancTec's activities "significantly enhanced [Dell Catalog's] ability to establish and maintain its market for Dell computers in New Mexico," *id.* at 83a. The hearing officer rejected Dell Catalog's arguments that a third party's activities could establish the constitutionally required nexus only if the activities were undertaken to promote the sales at issue or were carried out as the vendor's agent. *See id.* at 72a-80a.

4. The court of appeals affirmed.[9] The court found that the tax was constitutional because BancTec's activities created a "substantial nexus" between Dell Catalog and the state. *See* Pet. App. 17a-24a. The court acknowledged that "[t]he United States Supreme Court has not yet addressed the question of whether a third party's non-sales activities in the taxing state can constitute nexus." *Id.* at 21a. In the court of appeals' view, this Court's decisions in *Tyler*

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[8] The hearing officer concluded that the "sale" of computers occurred where possession of the computers was transferred to the buyers, that is, in New Mexico. *See* Pet. App. 50a-52a.

[9] The court of appeals concluded that the sales of computers fell within the tax statute because the goods "had New Mexico as their destination and were, in effect, 'consumed' in New Mexico." Pet. App. 14a.

Pipe and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), which addressed whether third parties engaged in solicitation could establish an out-of-state vendor's nexus with a taxing state, did not foreclose the possibility that *non-solicitation* activities could similarly create a substantial nexus. *See* Pet. App. 19a-21a. Instead, the court reasoned that BancTec's activities "helped [Dell Catalog] 'establish and maintain a market'" for Dell computers. *Id.* at 21a (quoting *Tyler Pipe*, 483 U.S. at 250). The court similarly noted that "'BancTec served an important need'" of Dell Catalog and that Dell Catalog "'benefitted financially from the sales of service contracts as well as the ability to have an outsourced repair service attend to the needs of its customers.'" *Id.* at 22a (quoting *Dell Catalog Sales, L.P. v. Commissioner of Revenue Servs.*, 834 A.2d 812, 822 (Conn. Super. Ct. 2003)). Because BancTec engaged in a significant number of service calls to New Mexico customers, the court of appeals concluded that BancTec's activities in the state were substantial enough to create a nexus between the state and Dell Catalog. *See id.* at 22a-23a.

5. The New Mexico Supreme Court denied Dell Catalog's petition for a writ of certiorari. *See* Pet. App. 104a.

REASONS FOR GRANTING THE PETITION

In holding that Dell Catalog is liable for New Mexico gross receipts tax on sales of its computer products to purchasers in New Mexico, the New Mexico Court of Appeals deepened an existing split of state court authority over the scope of this Court's decisions in *Scripto* and *Tyler Pipe*. Plenary review is warranted both to resolve this conflict and to fortify the bright-line constitutional rule of *Quill* and *Bellas Hess*, which has long been considered essential in promoting legal certainty for a large and growing segment of the national economy. On the merits, this Court should hold that states lack authority under the Commerce Clause to tax mail- and Internet-order vendors based solely on contractual relationships with in-state third-party service providers not engaged in solicitation of sales and not acting on the vendor's behalf.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG STATE COURTS REGARDING THE SCOPE OF *SCRIPTO* AND *TYLER PIPE*

The New Mexico Court of Appeals held that Dell Catalog's sales of computers could be subject to gross receipts taxes because of the activities of BancTec – an unrelated third party that engaged in the repair of computers sold by Dell Catalog and belonging to BancTec's own customers. The court thus held that activities of a non-agent third party – activities that do not promote the sales that are being subjected to state-level taxation – can provide the substantial nexus required to render such taxation consistent with the Commerce Clause. New Mexico's loose interpretation of the substantial-nexus requirement

is consistent with decisions from at least two other jurisdictions, including California and Louisiana.[10]

Those decisions conflict, however, with decisions from at least four other jurisdictions, including Ohio, Connecticut, Pennsylvania, and Tennessee, which hold that the activities of a non-agent third party cannot create the substantial nexus required for taxation of out-of-state sales *unless* those activities directly promote those sales.[11] There is thus a sharp split in authority that warrants review by this Court. *See* Sup. Ct. R. 10(b).

A. This Court has long held that the Commerce Clause's "express grant to Congress of the power 'to regulate Commerce . . . among the several States'" also "contain[s] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Jefferson Lines*, 514 U.S. at 179 (quoting U.S. Const. art. I, § 8, cl. 3) (ellipsis in original). To ensure that a state tax does not unduly "interfere with interstate commerce," *Quill*, 504 U.S. at 309, this Court applies a four-part test first set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Court will sustain a state tax against a Commerce Clause challenge so long as the

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[10] *See Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176 (Cal. Ct. App. 2005); *State v. Dell Int'l, Inc.*, 922 So. 2d 1257 (La. Ct. App. 2006).

[11] *See SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991); *Bloomingdale's By Mail, Ltd. v. Commonwealth, Dep't of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd mem.*, 591 A.2d 1047 (Pa. 1991) (per curiam); *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999). *See also St. Tammany Parish Tax Collector v. Barnesandnoble.com*, 481 F. Supp. 2d 575 (E.D. La. 2007).

tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279.

With respect to the requirement of a "substantial nexus" between the taxed activity and the state, this Court has crafted and affirmed a "bright-line rule," *Quill*, 504 U.S. at 316, for out-of-state mail-order vendors (like Dell Catalog). "[A] vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." *Id.* at 311; *see Bellas Hess*, 386 U.S. at 758. Such a vendor must have some "physical presence in the taxing State," *Quill*, 504 U.S. at 314, and must have "substantial[ly]" more than the "slightest presence," *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 556 (1977) (internal quotation marks omitted). An out-of-state mail-order vendor whose only contacts with the state involve sending goods by mail or common carrier to fill orders from customers in the state enjoys a "safe harbor" from state sales and use taxes. *Quill*, 504 U.S. at 315.

In certain circumstances, the presence of a third party in the taxing state that solicits sales on behalf of the out-of-state vendor may be sufficient to create a nexus between the vendor and the state. In *Scripto*, the Court held that an out-of-state vendor of "mechanical writing instruments" was subject to state tax because it maintained a sales force of 10 "wholesalers or jobbers" to "solicit[]" "[o]rders for its products." 362 U.S. at 208-09. Each of the "brokers" had a "written contract and a specific territory," but they were treated as "independent contractor[s]"

rather than employees. *Id.* at 209. The Court held that the "fine distinction" between employees and independent contractors was "without constitutional significance." *Id.* at 211. The Court held instead that "tagging . . . the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon [his] effectiveness in securing a substantial flow of goods into" the state. *Id.*

More recently, in *Tyler Pipe*, the Court upheld the imposition of a state gross receipts tax on an out-of-state manufacturer that relied on an independent contractor located in the state to conduct all of the manufacturer's sales-related activities. *See* 483 U.S. at 249-51. The contractor "acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders." *Id.* at 249 (internal quotation marks omitted). In particular, "[t]he sales representatives provide[d] Tyler Pipe with virtually all their information regarding the Washington market, including: product performance; competing products; pricing, market conditions and trends; existing and upcoming construction products; customer financial liability; and other critical information of a local nature concerning Tyler Pipe's Washington market." *Id.* at 250 (internal quotation marks omitted). The Court found these activities to create a nexus between the sales and the state, reasoning that "the crucial factor governing nexus is whether the activities performed in th[e] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Id.* (internal quotation marks omitted).

B. *Scripto* and *Tyler Pipe* established that solicitation of sales on an out-of-state vendor's behalf by in-state third parties can create a nexus between a

state and the out-of-state vendor sufficient to impose state taxation consistent with the Commerce Clause. But courts and commentators have suggested that those cases left unclear the "nature and extent," *Scripto*, 362 U.S. at 211, of third-party activities – particularly in contexts other than solicitation – that may be so "significantly associated with the taxpayer's ability to establish and maintain a market . . . for the sales," *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted), that they justify imputing nexus to out-of-state vendors. *See* Pet. App. 21a ("The United States Supreme Court has not yet addressed the question of whether a third party's non-sales activities in the taxing state can constitute nexus."); Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 19.02[2] (3d ed. 1998) ("*Scripto* and *Tyler Pipe* make it clear that nexus of an out-of-state seller may be established by the activities of unrelated third parties who act on behalf of the seller in the state. What remains unclear is the extent to which activities of independent contractors in a state will subject an out-of-state seller to [state taxes]."). State courts have split on the question whether third-party activities other than direct promotion of sales can constitute the requisite nexus to tax an out-of-state vendor.

1. Several state courts have held – correctly in our view – that the activities of a third party that do not directly promote the sales that are subject to taxation do not enhance the vendor's ability to establish or maintain a market for its sales within the meaning of *Tyler Pipe*. Such non-sales-promoting activities are therefore insufficient to justify state-level taxation of the out-of-state vendor's sales.

For example, in *SFA Folio Collections v. Tracy*, the Ohio Supreme Court held that the separate mail-order affiliate of Saks Fifth Avenue, a bricks-and-mortar retailer with stores in the taxing jurisdiction, did not have a substantial nexus with the state by virtue of the stores; the court therefore rejected as inconsistent with the Commerce Clause the Ohio tax commissioner's assessment of a use tax on the mail-order subsidiary. In that case, the stores accepted returns from the mail-order business and distributed the mail-order business's catalogs. *See* 652 N.E.2d at 695-96. The court reasoned that such contacts between the two separate entities were not tantamount to "the in-state affiliate . . . own[ing] or operat[ing] an in-state place of business" for the mail-order affiliate. *Id.* at 697. The court therefore concluded that the mail-order company's "selling activity does not have substantial nexus with Ohio because [it] does not have a physical presence in Ohio." *Id.* (citing *Quill*, 504 U.S. at 314-15).

The Connecticut Supreme Court reached the same conclusion with respect to the same entities in *SFA Folio Collections v. Bannon*. There, too, the court overturned the Commissioner of Revenue's assessment against the mail-order affiliate on federal constitutional grounds. The court held that its decision was "governed" by *Bellas Hess*, 585 A.2d at 670, and in particular that the retail stores' distribution of catalogs did not create a nexus between the mail-order affiliate and the state because the retail stores did not "solicit" mail-order sales, *id.* at 671. The court distinguished *Scripto* on that ground. *See id.*

The Pennsylvania Supreme Court affirmed the decision of a lower court that considered similar facts and found no nexus between the state and a mail-

order affiliate of a physical department store chain because the stores "do not solicit orders on [the mail-order affiliate's] behalf" or "act as its agents in any fashion," and any similarities in "advertising themes and motifs" were too insubstantial to "constitute a nexus for use tax purposes." *Bloomingdale's By Mail*, 567 A.2d at 778. The lower court distinguished *Scripto* on the ground that the absence of any direct promotion of sales negated the argument that the mail-order subsidiary "ha[d] agents acting on its behalf" in the state. *Id.* The court therefore held that the Pennsylvania Department of Revenue's "attempt to impose . . . a duty [to collect use tax on the mail-order sales] violates the United States Constitution." *Id.*

In *J.C. Penney*, a Tennessee appellate court rejected imposition of franchise and excise taxes against the credit card affiliate of a national retail chain, finding the case to be "governed by *Bellas Hess* and *Quill*." 19 S.W.3d at 839. In particular, the court found that the retail stores "conducted no activities which assisted" the separate credit card subsidiary "in maintaining its credit card business" in the state because "one could not apply for the . . . credit cards at the . . . retail stores" or "make a payment . . . at the retail stores." *Id.* at 840-41. The court distinguished *Scripto* and *Tyler Pipe* on the ground that "[t]he solicitation, which was the most important function in allowing [the credit card subsidiary] to maintain its business, took place through the U.S. Mail." *Id.* at 841.

At least one federal court has reached a similar conclusion. In *Barnesandnoble.com*, a locality attempted to tax Barnesandnoble.com, an Internet-based retailer of books, movies, and music, on the basis of the phy-

sical presence in the jurisdiction of Barnes & Noble retail stores, which were owned by a common corporate parent. *See* 481 F. Supp. 2d at 576. The state argued that several aspects of the two entities' business relationship established a substantial nexus on behalf of the Internet-order company, including their joint participation in discount and gift card programs (whereby "members" could enjoy discounts and gift cards that could be redeemed at both online and physical stores), their cross-promotional advertising arrangements, and their cooperative agreement under which the bricks-and-mortar stores accepted returns of items purchased from the online store. *See id.* at 578. The court disagreed, finding that none of the retail stores' activities was "tantamount to acting as a sales presence" for the online store, as were the third-party activities in *Scripto* and *Tyler Pipe*. *Id.* at 581; *see id.* (noting that physical stores "ha[ve] never taken or solicited orders on behalf of Online and did not provide facilities to place orders with Online"). The court noted that, although "Online may have derived a benefit from Booksellers' advertising of the program," that benefit was "not sufficient to impute [Booksellers'] presence to Online." *Id.* at 581-82.

In each of these cases, the relationship between the out-of-state mail-order vendor and the in-state party could have been said to promote sales in an indirect way – for example, by making it easier to return purchased merchandise. But the courts in these cases correctly determined that such indirect benefits – unlike the solicitation found sufficient to confer nexus in *Scripto* and *Tyler Pipe* – were insufficient to impute the physical presence of the in-state entity

to the out-of-state mail-order vendor for purposes of taxing the out-of-state vendor's sales.

2. The court below, by contrast, read *Scripto* and *Tyler Pipe* broadly to permit taxation of sales by an out-of-state seller as long as an in-state third party engages in activities that benefit the out-of-state seller. *See* Pet. App. 21a. The court specifically rejected any "sales-related" limitation on the third-party's activities that could provide a basis for taxation of the out-of-state vendor, reasoning that the absence of any precedent from this Court approving such taxation "does not equate to a holding that [non-sales] activities *cannot* provide nexus." *Id.* Instead, the court held that "the availability of in-home service was an important factor in establishing [Dell Catalog's] market for sales." *Id.* at 21a-22a (brackets and internal quotation marks omitted). Because BancTec "served an important need" of Dell Catalog and Dell Catalog "benefitted financially from . . . the ability to have an outsourced repair service attend to the needs of its customers," the court found that Dell Catalog had sufficient contact with the state to subject its computer sales to state gross receipts taxation. *Id.* at 22a (internal quotation marks omitted).[12] *See also Dell Int'l*, 922 So. 2d at 1263-66 (reversing summary judgment for related Dell entity).

Other courts have applied the same loose test. In *Borders Online*, for example, a California appellate court held that "there is no requirement that the out-

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[12] The court below drew support from *Dell Catalog Sales*, a Connecticut trial court decision involving the same issue between the same parties. That court ultimately found, however, that the state taxing authority failed to carry its evidentiary burden to show that BancTec itself had "sufficient, substantive physical presence in the state." 834 A.2d at 822-23.

of-state retailer's in-state representative be engaged in the solicitation of sales or in sales transactions to satisfy the substantial nexus required by the [C]ommerce [C]lause." 29 Cal. Rptr. 3d at 1199. Rather, "the analysis turns on the totality of the activities undertaken to maintain a successful market." *Id.* at 1197. That court found that Borders Online, an Internet-based bookseller, had a nexus with the state through the activities of a separate but related company that maintained physical stores. Those activities included accepting returns from the Online affiliate and engaging in cross-marketing and branding such as "the use of similar logos" and store receipts "imprinted with" Online's web address. *Id.* at 1199. The court held that the return policy was "part of [Online's] strategy to build a market in California" and that "[t]he cross-selling synergy" "amply support[ed]" the conclusion that the physical stores' activities created a nexus between the state and the online affiliate. *Id.*

II. THE COURT BELOW ERRED IN FINDING NEXUS ON THE BASIS OF BANCTEC'S NON-SOLICITATION ACTIVITIES

The existence of a conflict among the states regarding the important constitutional question presented justifies review. And review is called for as well because the New Mexico court misread this Court's Commerce Clause jurisprudence and failed to give effect to the policies underlying it.

In *Bellas Hess* and *Quill*, this Court established a "bright-line" rule, *Quill*, 504 U.S. at 315, that the Commerce Clause bars a state from taxing out-of-state mail-order vendors that lack a physical presence in the state and "'whose only connection with customers in the taxing State is by common carrier

or the United States mail,'" *id.* (quoting *Bellas Hess*, 386 U.S. at 758) (brackets omitted). Dell Catalog's sales of computers – taken alone – would qualify for that "safe harbor" from state taxation. *Id.* The state court erred in holding that BancTec's separate computer-repair activities could subject Dell Catalog's sales to state taxation when those activities did not solicit the sales at issue. The effect of the state court's standard is to undermine the substantial-nexus requirement by allowing a state to tax an out-of-state entity based on in-state activities of unrelated third parties, not undertaken on the taxpayer's behalf, merely because those activities facilitate the *use* of a product after its sale. The Court should disapprove that expansion of state power to tax sales by out-of-state vendors, an expansion that threatens to overwhelm any effective constitutional limitation on the states' power.[13]

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[13] *Quill* and *Bellas Hess* retain their vitality. As this Court noted in *Quill*, "Congress is . . . free to decide whether, when, and to what extent the States may burden interstate mail-order concerns" with state taxes. 504 U.S. at 318. In the Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Tit. XI, 112 Stat. 2681, 2681-719 (1998) ("ITFA"), Congress relied on existing limitations on state taxing power under the Commerce Clause to establish a moratorium on certain state taxation of Internet-based sales of goods and services. *See* ITFA § 1104(2)(B)(i), 112 Stat. 2681-725 (providing that "the sole ability to access a site on a remote seller's out-of-State computer server" is not a basis for imposition of state taxation); *id.* § 1104(2)(B)(ii), 112 Stat. 2681-725 (providing that an in-state Internet-access provider cannot be deemed an "agent" of the seller based solely on "the display of a remote seller's information" or "the processing of orders" through the provider's servers); *see also* S. Rep. No. 105-276, at 5 (1998) (noting, after discussing *Quill*, that the bill does not "modif[y] the present-law rules for determining when an interstate seller has a 'nexus' with a State"). Congress has repeatedly extended the life of the moratorium, most recently

A. In *Scripto* and *Tyler Pipe*, this Court found that the in-state *solicitation* activities of unrelated third parties could be imputed to the out-of-state vendors to establish a substantial nexus between those vendors and the taxing states. As applied to mail-order vendors, the holding in those cases is consistent with the bright-line rule of *Bellas Hess* and *Quill*. The *Bellas Hess* and *Quill* rule draws a "sharp distinction . . . between mail order sellers with retail outlets, *solicitors*, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Bellas Hess*, 386 U.S. at 758 (emphasis added); *see Quill*, 504 U.S. at 311. The Court was careful to distinguish between sellers whose only contact with the taxing state is their shipment of out-of-state goods to in-state customers and sellers that directly or indirectly engage in actual sales activities within the state. Only sellers that engage in the latter activity are "accorded the protection and services of the taxing State" such that the state can justifiably tax the sales. *Bellas Hess*, 386 U.S. at 757.

Scripto and *Tyler Pipe* recognize that the relevant in-state sales activities need not be undertaken by the vendor itself, but may instead be undertaken by a third party on the vendor's behalf. Imputing that third party's contacts to the out-of-state vendor ensures that mail-order (or other) sellers cannot engage in "a stampede of tax avoidance" through "formal contractual shifts" from in-state employees to in-state independent contractors. *Scripto*, 362 U.S. at 211 (internal quotation marks omitted); *see also*

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until 2014. *See* Internet Tax Freedom Act Amendments Act of 2007, Pub. L. No. 110-108, § 2, 121 Stat. 1024, 1024.

Tyler Pipe, 483 U.S. at 250-51; *Barnesandnoble.com*, 481 F. Supp. 2d at 581 ("In *Tyler Pipe* and *Scripto*, the Supreme Court was concerned that companies could avoid tax obligations merely by reclassifying employees, such as salespeople, as independent contractors."). Those cases thus reflect and give effect to the distinction between in-state solicitation, which subjects the goods sold to state taxation, and the mere shipping of goods into the state, which does not.

The third-party conduct at issue here differs from the conduct in *Scripto* and *Tyler Pipe* because it does *not* involve the solicitation of sales. Rather, BancTec offered an in-state repair service and did not solicit sales for Dell Catalog at all. Accordingly, unlike in-state solicitation, BancTec's activities are not related to the "activity" to which the state "tax is applied" – the *sales*. *Complete Auto*, 430 U.S. at 279.

The state court believed that the inquiry "whether the activities . . . are significantly associated with the taxpayer's ability to establish and maintain a market in th[e] state for the sales," *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted), asks whether the third-party's activities facilitates the out-of-state vendor's sales by making its products more attractive. *See* Pet. App. 21a-22a. But that reading turns the substantial-nexus requirement on its head. The mere existence of in-state service providers specializing in Dell computers could not subject Dell Catalog's mail-order sales to taxation. That Dell Catalog assisted BancTec to pursue its in-state repair activities – activities that *were* subject to in-state taxation – does not mean that BancTec was promoting Dell Catalog's sales in the constitutionally relevant sense. To the contrary, it is undisputed that BancTec did not solicit sales for Dell Catalog.

Moreover, the state court ignored this Court's requirement that the relevant activities must be carried out "on behalf of" the taxpayer. *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted). BancTec did not undertake any activities on behalf of Dell Catalog; rather, BancTec carried out its repair activities to fulfill its own obligations to the customers who bought its service contracts. *See* Pet. App. 38a. The court below appears to have equated "on behalf of" with "for the benefit of." But those two concepts are not the same.

To be sure, the availability of BancTec's service may have made Dell computers more attractive to New Mexico consumers. But it will frequently be true that there exists an in-state infrastructure to support an out-of-state seller's product – providers of repair service; in-state vendors of replacement parts and supplies like ink, paper, or chemicals; providers of ancillary equipment or training. The out-of-state vendor may facilitate those in-state activities by providing training, specifications, or proprietary equipment to those third parties. More generally, an out-of-state vendor may cultivate relationships with in-state actors, relationships that have the effect of indirectly promoting the vendor's business. The third parties' in-state activities in all such cases would be subject to taxation by the state – as BancTec's activities were in this case. But they cannot – consistent with this Court's Commerce Clause jurisprudence – subject the out-of-state vendor's sales to taxation.

B. *National Geographic* is not to the contrary. In that case, the taxpayer itself maintained two offices within the taxing state. Although the offices were not directly involved in the taxpayer's mail-order sales, this Court held that their existence established

a sufficient nexus between the taxpayer's out-of-state mail-order sales business and the taxing state to subject those sales to state-level taxation. *See* 430 U.S. at 561 (stating that "the Society's two offices, without regard to the nature of their activities," had a sufficient connection with the state for taxation purposes).

National Geographic may be read to suggest that, if Dell Catalog *itself* performed repair service in New Mexico, the fact that the repair personnel refrained from sales activities would not pose any constitutional bar to taxation of Dell Catalog's sales. But such a rule would have no application here, because Dell Catalog did not offer repair service in New Mexico, nor did BancTec offer such service on Dell Catalog's behalf. Rather, as the court below recognized, BancTec was an independent third party that was not acting as Dell Catalog's agent. *See* Pet. App. 3a-4a; *cf.* Declaratory Ruling, *In re Gateway 2000, Inc.*, Docket No. 96-30-6-0033, 1996 Iowa Tax LEXIS 2, at *5 (Iowa Dep't Revenue & Fin. Mar. 19, 1996) ("[T]he service warranty work performed under the service warrantor's own on-site service warranty is not performed on behalf of or at the direction of [the computer manufacturer].") (internal quotation marks omitted).

In any event, the question whether *National Geographic* reflects the Court's current interpretation of the Commerce Clause has itself provoked a split of authority among the states. Although the *National Geographic* Court stated the question presented in terms of both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause, *see* 430 U.S. at 554, the Court has "not always been precise in distinguishing between the two." *Quill*, 504 U.S. at 305. *National Geographic*'s holding

appears to reflect Due Process Clause principles – not necessarily Commerce Clause principles. The Court stated, for example, that "the relevant constitutional test . . . is . . . whether the facts demonstrate 'some definite link, some minimum connection, between [the State and] the *person* . . . it seeks to tax.'" 430 U.S. at 561 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)) (alteration, emphasis, and third ellipsis in original). The quoted passage from *Miller Bros.* interprets the Due Process Clause, *not* the Commerce Clause. *See Miller Bros.*, 347 U.S. at 344-45 ("[D]ue process requires some definite link, some minimum connection, between a state and the person . . . it seeks to tax.").

The Court has since held that "the nexus requirements of the Due Process and Commerce Clauses are not identical." *Quill*, 504 U.S. at 312. Because "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy," *id.*, "[a] tax may be consistent with due process and yet unduly burden interstate commerce," *id.* at 313 n.7. Thus, state courts after *Quill* have divided on the question whether a vendor's *own* in-state activity unrelated to its sales can subject the vendor's sales to taxation. *Compare In re Appeal of Intercard, Inc.*, 14 P.3d 1111, 1113-14, 1122-23 (Kan. 2000) (holding that 11 in-person technician calls to install purchased goods, in the absence of in-state solicitation, were "insufficient to establish a substantial nexus to Kansas"), *with Orvis Co. v. Tax Appeals Tribunal*, 654 N.E.2d 954, 962 (N.Y. 1995) (holding that vendor's 41 in-state "trouble-shooting visits . . . enhanced sales and significantly contributed to [vendor's] ability to establish and maintain a market").

Here, BancTec's activities involved post-sale service and repair – not sales – and those activities cannot be imputed to Dell Catalog. Even if they were relevant, those repair activities, like the returns and distribution of catalogs in *SFA Folio Collections v. Tracy*, "might provide minimal connection under due process standards," but they "do not create substantial nexus" under the Commerce Clause, 652 N.E.2d at 697, because they are unrelated to the sales of computers that are the object of the tax.

III. THE QUESTION PRESENTED IS ONE OF SIGNIFICANT NATIONAL IMPORTANCE AND IS LIKELY TO RECUR

This case involves the constitutional limits on state taxation of goods sold by mail or over the Internet – a roughly $190 billion industry. *See* U.S. Census Bureau, *2006 E-commerce Multi-sector Report*, Table 6/historical (May 16, 2008) ("*2006 Report*"), *available at* http://www.census.gov/eos/www/2006/historical/2006ht.pdf. Without further guidance from this Court, participants in this growing and increasingly important retail sector will be hampered in their business planning and investment, with the threat of state-level taxation shadowing cooperative efforts with independent third parties.

A. As the Court stated more than 40 years ago, "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions" involved in these cases. *Bellas Hess*, 386 U.S. at 759. The Court recognized the special characteristics of the mail-order industry and "demarcat[ed] . . . a discrete realm of commercial activity that is free from interstate taxation." *Quill*, 504 U.S. at 315; *see also* Hellerstein & Hellerstein, *State Taxation* ¶ 19.02[3][c][vi] (noting that *Quill* "may

arguably be read to have established a 'bright-line' physical-presence standard only for sales and use taxes on the mail-order industry alone, relegating other industries and other taxes to 'the more flexible balancing analyses' the Court's 'Commerce Clause jurisprudence now favors'") (quoting *Quill*, 504 U.S. at 314).

That determination deserves to be reaffirmed. In *Quill*, the Court specifically rejected a challenge to the *Bellas Hess* rule predicated upon the changed circumstances of the national economy. Indeed, the lower court in *Quill* justified its rejection of the *Bellas Hess* rule in part based on changes in the "economic, social, and commercial landscape" since *Bellas Hess*. *State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992). The North Dakota Supreme Court observed that, in the years since *Bellas Hess*, mail-order retailing "ha[d] grown from a relatively inconsequential market niche into a goliath," *id.*, and that technological changes rendered the techniques of mail-order retailing in the early-1990s vastly different from those in the late 1960s, *see id.* at 209. In the lower court's view, these developments undermined both the exclusively interstate character of such sales and the desirability of shielding such activities from state taxation. *See id.* at 213-15.

This Court rejected that reasoning, noting instead that the *Bellas Hess* rule "has engendered substantial reliance and has become part of the basic framework of a sizable industry." *Quill*, 504 U.S. at 317. Indeed, as the *Quill* court noted, "it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation." *Id.* at 316.

The same can be said about the development of Internet commerce in the years following *Quill*. Today, the mail- and Internet-order industry has undergone another round of technological changes and plays an even larger role in the national economy. Internet commerce barely existed as late as 1995. By 1999, it had grown to just under $12 billion in retail sales, and by 2006 that figure had grown to $75 billion. *See 2006 Report*, Table 6/historical; U.S. Census Bureau, *1999 E-commerce Multi-sector Report*, Table 5 (Mar. 7, 2001), *available at* http://www.census.gov/eos/www/1999/1999estatstables.pdf. That dramatic growth has been accompanied by significant benefits for American consumers, promoting intense competition and expanded choices. And, while the scale and scope of mail- and Internet-order commerce has increased dramatically since *Quill*, its fundamentally interstate character has not changed; the justifications for the bright-line rule that the *Quill* Court found compelling retain their force today.

B. This Court's review is needed because the states' various interpretations of this Court's Commerce Clause jurisprudence have created significant disuniformity and confusion with respect to the state tax obligations of mail-order and Internet retailers. The creation of conflicting obligations to the various states on the part of fundamentally interstate businesses is precisely what the Commerce Clause is supposed to prevent. As the Court recognized in *Bellas Hess*, the "welter of complicated obligations to local jurisdictions with no legitimate claim to impose" a tax undermines "[t]he very purpose of the Commerce Clause," which is "to ensure a national economy free from such unjustifiable local entanglements." 386 U.S. at 759-60. The Court reiterated that concern

in *Quill*, noting that any "artificiality" created by a "clear rule" is outweighed by the benefits of such a rule. 504 U.S. at 315. In particular, "[s]uch a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." *Id.*

In this case, reaffirming that third-party nexus can be created only by sales-related activities will bring much-needed uniformity to a controversial area of the law. The conflicting court decisions described above cast a shadow of uncertainty on the taxation policies of a majority of the states. At least 25 states and the District of Columbia have taken the position that "providing in-state warranty repair services through third party repair service providers . . . creates constitutional nexus" for imposing state taxes. Multistate Tax Commission, Nexus Program Bulletin No. 95-1, at 2 (Dec. 20, 1995; rev. Sept. 10, 1996), *available at* http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Nexus_Program/Archives/Nexus_Bulletins/NB%2095-1.pdf.[14] The states might use this uncertainty as leverage to seek voluntary payment of taxes by mail- and Internet-order vendors. Nineteen states have signed the Streamlined Sales and Use Tax Agreement, which implements a voluntary online seller registration system by which registrants pay "streamlined" state sales and use taxes prospectively in return for amnesty. *See* Press Release,

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[14] As described above, the provision of in-state repair services by BancTec is governed not by warranty but by an independent service contract. There is sufficient overlap, however, between fact patterns involving warranty and non-warranty repair service that the bulletin released above may foreshadow states' resolution of cases like this one.

Streamlined Sales Tax Governing Board, Inc., *Sales Tax Simplification Agreement Becomes Effective Today and Launches Key Element: Amnesty Program* at 1 (Oct. 3, 2005) ("While current law does not require e-commerce and direct mail companies to collect and remit sales taxes on transactions that occur in jurisdictions where they do not have a physical presence, the states expect some of these companies may come forward and volunteer to collect taxes under the simplified system."), *available at* http://www.streamlinedsalestax.org/press_rel/Press%20Release%20Inaugural%20Gov%20Board%20-%20Final.pdf.

Furthermore, the Court has recognized the importance of clear rules in this area: "a bright-line rule in the area of sales and use taxes . . . encourages settled expectations and, in doing so, fosters investment by businesses and individuals." *Quill*, 504 U.S. at 316. The decision below threatens to replace the bright-line rule of *Bellas Hess* and *Quill* with a detailed and fact-specific inquiry into the activities of any in-state business partners of the out-of-state vendor. That time-consuming and uncertain inquiry will retard growth and innovation in a critical area of the national economy.

C. Finally, although this case involves a decision of an intermediate state court, it is nevertheless an appropriate vehicle to consider the question. This Court has not hesitated to review decisions of intermediate state appellate courts after denial of further discretionary review when those decisions raise significant questions about the scope of the dormant Commerce Clause. *See, e.g.*, *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dep't of Revenue*, 128 S. Ct. 1498, 1504 (2008); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 308 (1994). The division of

authority is well developed, with state courts sharply divided over the question whether a third party's non-sales-solicitation activities may establish the substantial nexus required under the Commerce Clause. And, in the absence of any relevant factual dispute, the Court's resolution of the question presented will control the legality of the tax imposed below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 15, 2008

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IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 26,843

DELL CATALOG SALES L.P.,
Protestant-Appellant,
v.
TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Respondent-Appellee.

Filing Date: June 3, 2008

Appeal from the Taxation and Revenue Department
of the State of New Mexico
Margaret B. Alcock, Hearing Officer

OPINION

FRY, Judge.

{1} Dell Catalog Sales L.P. (Taxpayer) appeals from a decision and order of a hearing officer of the New Mexico Taxation and Revenue Department (the Department). Pursuant to the Gross Receipts and Compensating Tax Act (the Act), NMSA 1978, §§ 7-9-1 to -111 (1966, as amended through 2007), the Department assessed gross receipts taxes on Taxpayer's mail-order computer sales and compensating taxes on Taxpayer's use of distributed catalogs. Taxpayer disputes that its activities are subject to gross receipts and compensating taxes, arguing that imposition of the taxes (1) is wrong under the language of the Act itself and (2) violates the Commerce Clause

of the United States Constitution. We affirm the hearing officer's assessments of both gross receipts tax and compensating tax.

BACKGROUND

{2} Taxpayer is a Texas limited partnership with its principal place of business in Round Rock, Texas. Taxpayer does not own or lease property in New Mexico, has no retail stores within the state, and has no sales agents or employees here. Taxpayer does not franchise or license its trade name in New Mexico.

{3} Taxpayer, an entity created to sell computers to individual customers, is a partnership owned entirely by Dell, Inc. (known as Dell Computer Corporation at the time of the audit). Dell, Inc. owned several other limited partnerships, including Dell USA, L.P., which "performed general and administrative services for the other limited partnerships," Dell Products, L.P., which researched, developed, and manufactured computer products for the other limited partnerships, and Dell Marketing, L.P. and Dell Direct Sales, L.P., which sold computers to businesses and institutions. The limited partnerships were separately controlled by their own individual "executives, officers and employees who were responsible for the policy-making and day-to-day operations." The separate entities did not distinguish themselves by their separate names in contracts and advertising materials with outside parties, referring to themselves collectively and individually as "Dell."

{4} Taxpayer, using a "direct-to-the-customer sales model," sold computers to individual customers, which entailed Taxpayer's purchasing computers and related goods from Dell Products L.P. and re-selling them to individual consumers by way of mail-order catalogs and internet sales. At all relevant times,

individual customers contacted Taxpayer in Round Rock, Texas, directly by telephone, mail, or over the internet and placed orders by email, telephone, mail, or facsimile. Taxpayer shipped the computers and merchandise to customers in New Mexico on a common carrier selected by Taxpayer; customers did not have the option to pick up their merchandise directly. The contracts between Taxpayer and its customers specified that the title to the merchandise transferred from Taxpayer to the customer *upon shipment* from the facility outside of New Mexico, but Taxpayer retained the risk of loss on merchandise until delivery to the customer.

{5} Under the name Dell Home Systems, Taxpayer also advertised by mailing catalogs to potential customers in New Mexico. The catalogs were not designed, printed, prepared, or stored in New Mexico, and they were mailed from out of state into New Mexico. Taxpayer also advertised in national specialty magazines but never entered New Mexico to purchase or display advertising materials.

{6} Taxpayer's merchandise was covered by a manufacturer's limited warranty covering parts and labor in the first year and parts only in the second and third years. The warranty did not provide for "on-site repair services"; rather, it required that a customer ship the defective part(s) back to Taxpayer in Texas for repair or replacement. If the customer was willing to replace a defective part, then Taxpayer would mail the replacement part to the customer and include a prepaid return shipping label for the customer to return the defective part.

{7} For those customers who wanted on-site repair service, Taxpayer contracted with a third-party service provider, BancTec U.S.A., Inc. (BancTec), to

repair Dell computers at the customers' homes under service contracts that Taxpayer sold to customers. BancTec is a Delaware corporation with its principal place of business in Dallas, Texas. Taxpayer has no ownership interest in BancTec, and BancTec owns no part of Taxpayer's limited partnership or any other Dell enterprise.

{8} Essentially, Taxpayer sold service contracts to its customers who bought computers, and Taxpayer negotiated with BancTec for BancTec to provide the in-home service repairs on the computers. Purchasers of computers had the option of purchasing a service contract at the time they purchased the computer or at any subsequent time. For example, when a customer ordered a computer over the phone, Taxpayer's representative would ask the customer if he wished to purchase a service contract. Taxpayer often "bundled" the cost of the service contract with other items in the sales package as a marketing tool.

{9} Following a purchase, when a customer in New Mexico contacted Taxpayer regarding a problem with a Dell computer, Dell Customer Technical Support (Technical Support) would first troubleshoot and attempt to resolve the problem over the phone. Only if Technical Support was unable to diagnose and correct the problem over the phone would Technical Support then contact BancTec to dispatch a technician to the customer's house to service the computer. Customers did not contact BancTec directly, but had to go through Taxpayer, and BancTec's name did not appear in Taxpayer's advertising materials. BancTec was required to accept all contracts sold by Taxpayer, and BancTec was the only service provider with which Taxpayer contracted to provide service at the time of the audit. The hearing officer found that

"[t]he availability of in-home service was an important factor in establishing [Taxpayer's] market for sales." Approximately seventy-five percent of Taxpayer's customers in New Mexico purchased the additional service contract.

{10} Once BancTec was dispatched to the customer, its activities were specifically defined in the agreement between Taxpayer and BancTec. For example, BancTec had to contact the customer within thirty minutes of the notice of dispatch, track every service call, and train its technicians to meet a certain skill level. BancTec's employees had to "conduct themselves in a manner that would professionally and positively represent the parent company as well as Dell Computer Corporation and other partners."

{11} After BancTec technicians diagnosed the problem on a service call, Technical Support would ship any parts necessary for a repair to a warehouse in Austin, Texas, owned by Taxpayer and subleased by BancTec. BancTec was required to use replacement parts issued by Technical Support, and BancTec, prohibited from using the parts provided by Taxpayer for any purpose other than servicing a customer's computer, was essentially a bailee of the replacement parts issued by Technical Support. If BancTec could not resolve the problem or had further complications on a call, the BancTec technician was required to call Technical Support for additional assistance.

{12} If the customer was unsatisfied with the BancTec technician, the customer did not report the complaint directly to BancTec but instead registered the complaint with Technical Support, which in turn reported the problem to BancTec management. BancTec's work was warranted to Taxpayer, not to the individual customers themselves. The agreement

between Taxpayer and BancTec provided that, in the event BancTec's "service level performance" was below a certain level for a set period of time, Taxpayer could take over BancTec's obligations or assign the obligations to another third party.

{13} BancTec was paid based on a formula that considered, among other factors, the number of on-site service repairs made during the previous ninety-day period and the level of BancTec's performance. The arrangement was profitable to both BancTec and Taxpayer. Dell, Inc. acted as agent for BancTec, registered BancTec in New Mexico, and paid all New Mexico gross receipts tax on Taxpayer's sale of BancTec's service agreements to New Mexico customers.

{14} In July 1999, the Department audited Taxpayer and determined that Taxpayer had not reported or paid either gross receipts taxes owed on its sales of computers to New Mexico customers or compensating taxes owed on the value of advertising materials Taxpayer distributed in New Mexico. The Department assessed a total of $1,817,693.43 for the period from January 1993 to June 1999, which included $1,140,735.71 for gross receipts tax and $31,908.69 for compensating tax. Taxpayer filed a written protest to the assessment.

{15} After a formal hearing before a hearing officer, the hearing officer submitted a sixty-page decision and order, incorporating many findings of fact based on the stipulated facts and the testimony at the hearing. The hearing officer concluded that: (1) Taxpayer was selling property in New Mexico and was liable for gross receipts tax on the sales, (2) imposition of the gross receipts tax did not violate the Commerce Clause of the United States Constitu-

tion, and (3) Taxpayer was liable for compensating tax on the catalogs it mailed to New Mexico addresses.

{16} Taxpayer appealed, asserting that its computer sales do not constitute "sales" within the meaning of the Act or, alternatively, if they are sales, that the imposition of gross receipts tax on the sales violates the Commerce Clause of the United States Constitution. Taxpayer makes the same statutory and constitutional arguments regarding the hearing officer's determination that the compensating tax applied to advertising materials used by Taxpayer. We address the arguments in turn.

DISCUSSION

Standard of Review

{17} Taxpayer raises statutory and constitutional issues on appeal, both of which are questions of law that we review de novo. *Sonic Indus. v. State*, 2006-NMSC-038, ¶ 7, 140 N.M. 212, 141 P.3d 1266 (applying de novo review of application of law to the facts and to questions of statutory interpretation); *Manning v. N.M Energy, Minerals & Natural Res. Dep't*, 2006-NMSC-027, ¶ 9, 140 N.M. 528, 144 P.3d 87 (reviewing constitutional question under de novo standard). We presume the tax assessments of the Department to be correct, NMSA 1978, § 7-1-17(C) (1992) (amended 2007), and we recognize that there is a statutory presumption that the gross receipts tax applies to any person engaging in business in New Mexico. § 7-9-5.

I. The Assessment of Gross Receipts Tax on Taxpayer's Sales of Computers in New Mexico Was Proper

{18} Our Supreme Court set out a two-part analytical process to determine whether the gross receipts tax applies in multi-state transactions.

> First we must engage in statutory interpretation to determine if the Legislature intended to tax those receipts under the [gross receipts tax]. Second, if we conclude [in the affirmative], we must determine whether the tax violates the Commerce Clause . . . of the United States Constitution.

Kmart Corp. v. Taxation & Revenue Dep't, 2006-NMSC-006, ¶ 11, 139 N.M. 172, 131 P.3d 22. We apply this framework to the present case.

A. Taxpayer's Activities Constitute Sales of Property in New Mexico for Purposes of the Act

{19} Our first inquiry is whether Taxpayer's activities constitute sales under the Act. To answer this question we use principles of statutory construction to guide us in our interpretation of the state tax code. "Our main goal in statutory construction is to give effect to the intent of the legislature." *Hall v. Carlsbad Supermarket/IGA*, 2008-NMCA-026, ¶ 7, 143 N.M. 479, 177 P.3d 530 (internal quotation marks and citation omitted). We discern legislative intent by first looking at the plain meaning of the language of the statute, reading "the provisions of [a statute] together to produce a harmonious whole." *Id.* (internal quotation marks and citation omitted).

{20} Section 7-9-3.5(A)(1) defines "gross receipts" as "the total amount of money or the value of other

consideration received from *selling property in New Mexico*." (Emphasis added.) In determining the meaning of the emphasized language, we first discuss our Supreme Court's recent cases addressing gross receipts tax, *Kmart* and *Sonic*.

{21} In *Kmart*, the Supreme Court addressed the issue of whether the gross receipts tax applied to the receipts from the granting of a license to use intellectual property, such as trademarks and trade names, when the licensing agreement activities all took place in Michigan. 2006-NMSC-006, ¶ 4. The parties to the licensing agreement in *Kmart* were Kmart, a retailer of goods that operated stores in New Mexico, and KPI, a wholly owned Michigan subsidiary of Kmart and "investment holding company" created to reduce Kmart's tax liabilities. *Id.* ¶¶ 3-5 (internal quotation marks omitted). After discussion of the purpose and history of the Act, our Supreme Court said that "the issue in this case may be resolved completely by examining the language of the . . . Act." *Id.* ¶¶ 12-15, 18. The Court said that "licensed property can only be subject to the [gross receipts tax] in New Mexico if the license was in essence *sold in New Mexico*," and the Act applies "when the selling of property takes place within the borders of New Mexico." *Id.* ¶ 18. The Court held that the intangible property rights at issue in *Kmart* were not sold in New Mexico because "all activity related to the License Agreement took place in Michigan." *Id.* Specifically, the Court noted that the "critical elements and parties" were in Michigan, and it rejected any argument that the gross receipts tax is intended to apply to property merely *used* in New Mexico. *Id.*

{22} The Supreme Court also addressed intangible property rights in *Sonic*. That case involved the

question of whether franchise rights sold out of state for use in New Mexico were taxable under the Act. 2006-NMSC-038, ¶ 14. Franchise owners traveled from New Mexico to Oklahoma to sign the agreements that gave them rights to use Sonic trademarks and other intellectual property, and the franchisees paid royalties based on the revenues of the Sonic franchises. *Id.* ¶ 2. The Court held that the sales of these intangibles were not taxable because the services provided by the corporation were "in large part performed outside New Mexico." *Id.* ¶¶ 1-2, 14.

{23} Relying on *Kmart* and *Sonic*, Taxpayer argues that its activities selling computers by mail, phone, and internet orders from its facility in Texas to New Mexico customers do not constitute "selling property in New Mexico" for purposes of the Act because it contends that the sales occurred in Texas, not New Mexico. Taxpayer's principal argument to support that contention is that a sale occurs where title transfers, not where the property is ultimately used or located.

{24} The hearing officer disagreed with Taxpayer and concluded that the transactions at issue were "consummated" in New Mexico when Taxpayer completed delivery of the computers to New Mexico customers because "one of the two parties and many of the critical elements involved in [Taxpayer's] sales of tangible goods were located in New Mexico." The hearing officer, concluding that the sales occurred in New Mexico, also based her decision on the facts that Taxpayer retained the risk of loss until delivery and that transfer of physical possession occurred within New Mexico.

{25} We agree with the hearing officer that the facts in *Sonic* and *Kmart* are distinguishable from the case

at bar. *Kmart* and *Sonic* apply in cases where the entire transaction occurs out of state and the parties are present out of state at the time and place of the transaction. In those circumstances, the transaction is clearly not a sale "in New Mexico" for purposes of the Act. *See Sonic*, 2006-NMSC-038, ¶ 2 (stating that "the franchisees travel[ed] to Oklahoma City to sign the [licensing agreements]"); *Kmart*, 2006-NMSC-006, ¶ 4 (stating that "[a]ll activity related to the License Agreement took place in Michigan"). In this case, however, a New Mexico customer picked up the phone, mailed an order form, or placed an order over the internet *from* New Mexico to Taxpayer in Texas. Furthermore, *Sonic* and *Kmart* involved the sale of intangible property between parties physically located out of state at the time of the transaction. In this case, the transactions involved tangible personal property—computers—that were shipped to customers in New Mexico. Unlike the circumstances in *Kmart* and *Sonic*, the transactions at issue in the present case were truly *interstate* in nature. We are therefore faced with the issue of whether, under the language of the Act, New Mexico is the appropriate place of taxation of Taxpayer's cross-border transactions.

{26} We thus look to other jurisdictions for guidance. Many states define sale for purposes of state sales tax as the "transfer of title or possession." *See, e.g.*, Cal. Rev. & Tax. Code § 6006(a) (West 1998); Fla. Stat. Ann. § 212.02(15)(a) (West 2007); Mass. Gen. Laws Ann. ch. 64H, § 1 (West 2007); N.Y. Tax Law § 1101(b)(5) (McKinney 2006); Ohio Rev. Code Ann. § 5739.01(B)(1) (West 2007). Others specifically define a sale as the "transfer of title" alone. *See, e.g.*, Conn. Gen. Stat. Ann. § 12-407(2)(A) (West 2007).

New Mexico's gross receipts tax does not limit taxation to transactions based on these specific legal or physical standards, however. The only definition of sale provided in the Act is that "selling" is "a transfer of property for consideration or the performance of service for consideration." § 7-9-3(A).

{27} Taxpayer urges this Court to read into the statutory definition the notion that a sale occurs where the transfer of title occurs. The Department, on the other hand, asks us to affirm the hearing officer's construction that the location of physical transfer or the location where risk of loss transfers from buyer to seller marks the location of the sale. Neither interpretation is expressly suggested by the Act's language. As a matter of statutory construction, we will not read language into a statute that is not there. *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 20, 141 N.M 686, 160 P.3d 595. Instead, we turn to the public policy behind the Act. *See Kmart*, 2006-NMSC-006, ¶ 12 (explaining that courts, in determining whether the legislature intended for the gross receipts tax to apply, should "examine both the purpose behind the [Act] and the statute's recent history").

{28} The Act is intended to "provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and *to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax.*" § 7-9-2 (emphasis added). Our understanding of this policy is aided by a discussion of gross receipts tax in the leading treatise on state and local taxation, which states:

> A good consumption tax should result in taxation in the jurisdiction in which consumption takes

> place. Taxing the sale or use of goods that cross state lines at their destination implements this principle because goods typically are consumed at their destination. Moreover, taxation by the state of destination promotes neutrality by treating all goods consumed in the state in the same way, regardless of the location from which they were shipped. Although the American retail sales tax is hardly a model of a good consumption tax, by and large it embraces the destination principle in its application to the sale of goods. "Imports" shipped from outside the state to purchasers within the state generally are subject to sales or use tax in the state of destination, and "exports" shipped from within the state to purchasers outside the state generally are exempt from sales or use tax in the state of origin.

II Jerome R. Hellerstein & Walter Hellerstein, State Taxation ¶ 18.02[1] (3d ed. 2002) (footnotes omitted).

{29} The "destination principle" of taxation, as articulated by the Hellerstein treatise, aligns with the policy underlying our gross receipts tax. Our gross receipts tax seeks to achieve fairness between out-of-state sellers and New Mexico sellers who sell to New Mexico customers. The destination principle furthers that policy by "promot[ing] neutrality by treating all goods consumed in the state in the same way, regardless of the location from which they were shipped." *Id.*

{30} Adoption of the destination principle does not require us to construe the gross receipts tax to include principles of transfer of title, transfer of possession, or risk of loss, which are concepts that were not included in the language employed by our legislature. Therefore, we hold that the destination principle applies to determine whether an interstate

transaction is a taxable sale under our gross receipts tax laws. Applying this rule to the facts in this case, we conclude that Taxpayer's activities constituted taxable sales in New Mexico. The computers sold by Taxpayer had New Mexico as their destination and were, in effect, "consumed" in New Mexico.

{31} We are not persuaded by Taxpayer's argument that transfer of title is the triggering event. Taxpayer quotes *TPL, Inc. v. New Mexico Taxation & Revenue Department*, 2003-NMSC-007, ¶ 26, 133 N.M 447, 64 P.3d 474, for the proposition that "[i]n cases involving the sale of goods, the place of transfer of title determines where the transaction is taxable." However, Taxpayer takes that quote out of context, and *TPL* does not in fact support Taxpayer's argument.

{32} At issue in *TPL* was whether a New Mexico company was entitled to deductions from gross receipts tax for its service of demilitarizing munitions for an out-of-state buyer of that service. *Id.* ¶ 1. Our Supreme Court held that the taxpayer had met its burden of establishing that it was entitled to the deduction because the out-of-state buyer neither made initial use of the service in New Mexico nor took delivery of the product of the service in New Mexico, as required by the applicable statute, Section 7-9-57(A), (C) (1989) (amended 1998 and 2000). *TPL*, 2003-NMSC-007, ¶ 1. Thus, unlike the circumstances in the present case, the buyer in *TPL* was located out of state, and the receipts that the Department sought to tax were for services provided by an in-state taxpayer. Essentially, the Supreme Court held that the taxpayer was entitled to the statutory deduction because the buyer had no New Mexico presence and the buyer received the benefit of the taxpayer's services the moment that the buyer shipped the munitions to

the New Mexico taxpayer for demilitarization. *See id.* That is, the consumption of the services occurred out of state.

{33} In this case, the facts are different. The purchaser of the property sold by Taxpayer is located in New Mexico, and Taxpayer is located out of state. The language quoted by Taxpayer is taken out of context and provides no analytical support in the construction of the different statutory provisions at issue here. Therefore, the holding in *TPL* does not directly speak to the issue of whether Taxpayer's activities constitute a sale in this case.

{34} We are equally unpersuaded by Taxpayer's reliance on the Uniform Commercial Code (UCC) for its contention that a sale is determined when title transfers. Taxpayer points to the UCC's official commentary, which notes that "transfer of title" and "transfer of property" are interchangeable concepts, *see* NMSA 1978, § 55-2-101 cmt. (1961), and to the UCC's provision that parties may reach agreement as to when and where title transfers. NMSA 1978, § 55-2-401(1) (2005) (stating that the "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties"). Taxpayer further argues that in *Transamerica Leasing Corp. v. Bureau of Revenue*, 80 N.M. 48, 53, 450 P.2d 934, 939 (Ct. App. 1969), this Court in fact relied on the UCC definition of a sale as "the passing of title from the seller to the buyer for a price." Taxpayer's argument is misplaced, however, because the quote from *Transamerica* is dicta and because it reads the UCC out of context.

{35} First, the quote from *Transamerica* upon which Taxpayer relies is dicta. The Court in *Transamerica* determined that the taxpayer was not subject to

gross receipts tax because it was not the seller of the goods in question, and in making this determination, the Court did not rely on the UCC definition. *See id.* (explaining that the taxpayer "was not the seller" of the goods but was instead the financing agent for the goods).

{36} Second, Taxpayer fails to note express internal limitations within the UCC. The hearing officer correctly observed that the UCC is focused on the rights of the parties to a sales contract, irrespective of "when property or title passed or was to pass." § 55-2-101 cmt. That is, according to the UCC, the point at which title passes is largely irrelevant under the UCC. Taxpayer acknowledges this inherent problem in relying on the UCC but maintains that the UCC is still informative about when a sale occurs. In defending its reliance on the UCC, Taxpayer cites to another secondary source, 1 Thomas M. Quinn, *Uniform Commercial Code Commentary & Law Digest*, § 2, at 2-784 (2d ed. 2002), to suggest that the rules on passage of title in the UCC's Article 2, while not important to the laws governing sales under the UCC, serve purposes "other than Article 2 needs," with one such purpose being to give guidance in state tax law. *Id.* § 2-401[A][4]. However, the Act does not indicate any reliance on the UCC, nor does it suggest that the definition of sale depends on the time title transfers.

{37} The hearing officer also correctly noted that the UCC is not intended to "override governmental or public determinations of what constitutes a sale." In response to this argument against the use of the UCC, Taxpayer contends that the hearing officer misinterpreted the Official Comment and that the UCC defines "sale" and "passage of title" in the event "the

courts deem any public regulation to incorporate the defined term of the 'private' law." § 55-2-401 cmt. 1. Taxpayer's point, however, does not change the fact that the UCC, by way of its official comments, self-limits the applicability of the UCC to the specific buyer/seller/creditor issues for which it was intended. Even though the UCC defined "sale" in terms of transfer of title to assist courts interpreting the terms of private law, it does not necessarily follow that this Court *must* adopt the UCC definitions, and we see no indication that our legislature intended to incorporate the UCC 's terms into the Act.

{38} In summary, we hold that the gross receipts tax applies in this case because, after an interstate sales transaction, the actual consumption and use of the computers occurred in New Mexico. Under our tax code, the goods in question were sold in New Mexico for purposes of imposition of the gross receipts tax.

B. Imposition of the Gross Receipts Tax Does Not Violate the Commerce Clause of the Federal Constitution

{39} Because we hold that Taxpayer's activities constituted sales occurring in New Mexico for purposes of the gross receipts tax, we turn to the question of whether imposition of the gross receipts tax violates the Federal Constitution. The Commerce Clause authorizes Congress to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In addition to this "affirmative grant of power," courts have construed the Commerce Clause to have a "negative sweep" as well, which "prohibits certain state actions that interfere with interstate commerce." *Quill Corp. v. N.D. ex rel. Heitkamp*, 504 U.S. 298, 309 (1992).

{40} With respect to state taxation of out-of-state businesses conducting interstate commerce, the United States Supreme Court set out a four-part test to determine whether a tax passes constitutional muster under the Commerce Clause in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Under *Complete Auto*, state taxation of out-of-state businesses conducting interstate commerce will be upheld under the Commerce Clause so long as the tax (1) is fairly apportioned, (2) does not discriminate against interstate commerce, (3) is fairly related to the services provided by the taxing state, and (4) is applied to an activity with a substantial nexus with the taxing state. *Id.* at 279. Taxpayer does not argue that the gross receipts tax in the present case contravenes the first three requirements; it challenges only the existence of a substantial nexus with New Mexico.

{41} The concept of "substantial nexus" under Commerce Clause jurisprudence is different from the idea of nexus in the context of a due process analysis. *Quill Corp.*, 504 U.S. at 312. With respect to due process, substantial nexus relates to notions of fairness. *Id.* ("[T]he due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him."). The nexus requirement under the Commerce Clause, however, is "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Id.*

{42} Recognizing the framers' intent to protect interstate commerce from potentially burdensome state tax regimes, the Supreme Court protected out-of-

state vendors whose only connection with the state seeking to impose taxation was the shipping of goods into the state by mail or common carrier and imposed a bright-line rule prohibiting taxation under those circumstances. *Id.* at 314-15 (explaining that this safe harbor "furthers the ends of the dormant Commerce Clause" in the hope that "burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation").

{43} In landmark cases dealing with substantial nexus, the issue has been whether an out-of-state business itself has the required nexus with the state seeking to impose taxation. *See, e.g., Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 753-56 (1967). In the present case, however, we address the extent to which a third party, BancTec, can establish a substantial nexus on behalf of the out-of-state business sufficient to satisfy Commerce Clause limitations on state taxation. Under such circumstances, "the crucial factor governing nexus is whether the activities performed in this state on behalf of a taxpayer are significantly associated with the taxpayer's ability to *establish and maintain* a market in [the taxing state] for the sales." *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250 (1987) (emphasis added) (internal quotation marks and citation omitted).

{44} In *Scripto, Inc. v. Carson*, 362 U.S. 207, 208 (1960), the Supreme Court upheld the imposition of a Florida sales tax on an out-of-state vendor that had no offices or employees within Florida. The out-of-

state vendor, however, relied on ten Florida resident "wholesalers or jobbers" that solicited orders on behalf of the vendor. *Id.* at 209. The contract between the vendor and the wholesalers specified that the wholesalers were "independent contractor[s]." *Id.* (internal quotation marks omitted). In holding that a substantial nexus existed between the vendor and the taxing state, the Court said that although the wholesalers were not regular employees of the vendor, "such a fine distinction is without constitutional significance." *Id.* at 211. The Court saw those types of contracts for out-of-state vendors as potentially ripe for abuse. "To permit such formal contractual shifts to make a constitutional difference would open the gates to a stampede of tax avoidance. Moreover, we cannot see, from a constitutional standpoint, that it was important that the agent worked for several principals." *Id.* (internal quotation marks and citations omitted).

{45} Similarly, in *Tyler Pipe*, the Supreme Court upheld the imposition of a Washington sales tax on an out-of state vendor. 483 U.S. at 250. The out-of-state vendor had no office or employees in Washington. *Id.* However, by virtue of the vendor's "independent contractors" who "acted daily on behalf of [the vendor] in calling on its customers and soliciting orders," the Court held that a substantial nexus existed between the vendor and the taxing state. *Id.* at 249-50 (internal quotation marks and citation omitted).

{46} The hearing officer in the present case held that Taxpayer itself lacked a physical presence in New Mexico, but that the presence of BancTec established the substantial nexus and that BancTec's activities "were significantly associated with [Taxpayer's] abil-

ity to establish and maintain a market for its computer products." Thus, the hearing officer upheld the imposition of the gross receipts tax because the tax did not violate the Commerce Clause.

{47} On appeal, Taxpayer challenges the hearing officer's legal conclusion that Taxpayer has a substantial nexus with New Mexico. Taxpayer specifically argues that for a third party to establish substantial nexus, the third party must be engaged in sales-related activities because, Taxpayer maintains, the United States Supreme Court "has *never* held that a third-party non-agent engaged in an activity other than solicitation creates nexus." Because BancTec was not engaged in soliciting sales, Taxpayer contends that the hearing officer essentially created a new category for establishing a substantial nexus through a third party that unconstitutionally expands state taxation authority.

{48} We do not agree. The United States Supreme Court has not yet addressed the question of whether a third party's non-sales activities in the taxing state can constitute nexus. This absence of case law does not equate to a holding that such activities *cannot* provide nexus. We decline to reach such a conclusion because it would ignore the reality of the relationship between BancTec and Taxpayer and the critical nature of BancTec's activities to Taxpayer's business. We agree with the hearing officer that BancTec's activities helped Taxpayer "establish and maintain a market," which *Tyler Pipe* viewed as the "crucial factor governing nexus." 483 U.S. at 250 (internal quotation marks and citation omitted). As noted in the summary of the facts above and as the hearing officer specifically found, "[t]he availability of in-home service was an important factor in establishing [Tax-

payer's] market for sales." "Approximately [seventy-five] percent of [Taxpayer's] New Mexico customers purchased a BancTec service contract."

{49} Our determination that substantial nexus exists is indirectly supported by *Dell Catalog Sales, L.P. v. Commissioner of Revenue Services*, 834 A.2d 812 (Conn. Super. Ct. 2003). In that case, the Superior Court of Connecticut considered the identical issue regarding the same taxpayer's nexus with Connecticut. *Id.* at 814. We recognize that in that case the ultimate resolution favored the taxpayer because there was a lack of evidence on the extent of the activities of the in-state service provider. 834 A.2d at 819-20 ("The missing ingredient in determining whether BancTec's on-site service established nexus in Connecticut as a representative of [the taxpayer] would be the frequency, if any, of the number of on-site service calls."). *Id.* at 822. The Connecticut court noted that "BancTec served an important need of [the taxpayer]," and that "[the taxpayer] benefitted financially from the sales of service contracts as well as the ability to have an outsourced repair service attend to the needs of its customers in Connecticut." *Id.* However, the Connecticut court had no evidence of the frequency of the service calls to determine whether BancTec's presence was "substantial," as required by *Quill*. *Dell Catalog Sales*, 834 A.2d at 822. By contrast, in the case at bar, the record establishes that Taxpayer dispatched BancTec technicians on 1,273 service calls and installation visits to New Mexico customers during the audit period. We can hardly call over one thousand service calls "isolated" or "sporadic." *Cf. In re Appeal of Intercard, Inc.*, 14 P.3d 1111, 1122 (Kan. 2000) (holding that eleven business visits made by out-of-state business to

taxing state during audit period were "isolated, sporadic, and insufficient to establish substantial nexus" with taxing state when out-of-state business's contracts and sales occurred out-of-state and it had no employees or offices in taxing state).

{50} Our holding is also supported by the Multistate Tax Commission's position on nexus. In MTC Bulletin 95-1, the Commission stated:

> The provision of warranty repair service in the customer's state is precisely the kind of presence that squarely supports the finding of substantial nexus. The provision of in-state repair services provided by a direct marketing computer company as part of the company's standard warranty or as an option that can be separately purchased and as an advertised part of the company's sales contributes significantly to the company's ability to establish and maintain its market for computer hardware sales in the State.

10 St. Tax Notes 62 (Jan. 1, 1996).

{51} We therefore hold that Taxpayer, through its relationship with BancTec and BancTec's activities in New Mexico, had a substantial nexus with New Mexico, and thus, that the Department's imposition of gross receipts tax does not violate the Federal Constitution on Commerce Clause grounds.

{52} Taxpayer warns that this holding expands the definition of sale under the statute and the concept of substantial nexus well beyond what our legislature and the framers, respectively, intended. Taxpayer also argues that our holding will cripple interstate commerce. We disagree. The Act's definition of sale is already broad enough to include interstate transactions where the property ends up in New Mexico.

The limits on state taxation, as noted above, are imposed by the Federal Constitution. Our opinion today merely reflects the reality of today's modes of commerce and recognizes that Taxpayer has chosen to conduct its business in such a manner as to benefit from an in-state presence acting on its behalf, all while trying to avoid paying tax on sales to which other New Mexico businesses are subject.

II. Assessment of Compensating Tax on Taxpayer's Distribution of Catalogs Is Valid

{53} We now turn to the question whether Taxpayer's distribution of catalogs designed, printed, and prepared outside New Mexico and mailed to New Mexico constitutes a taxable use of property for purposes of the compensating tax. The compensating tax, coupled with the gross receipts (sales) tax, creates a complementary consumption tax scheme, whereby sales in New Mexico are taxed under the gross receipts tax, *see* § 7-9-3.5, and purchases made out of state where the tangible property bought is then brought into New Mexico for use are subject to compensating tax. *See* § 7-9-7(A). Applying the *Kmart* framework to the compensating tax, we first consider whether Taxpayer's activities constitute a use under the statute and then turn to the constitutional issue. *Kmart*, 2006-NMSC-006, ¶ 11.

A. Taxpayer Used Catalogs as Advertising Materials Within the Meaning of the Act

{54} Our first inquiry is whether Taxpayer's distribution of catalogs constitutes taxable use under the compensating tax provision of the Act. The hearing officer held that Taxpayer was liable for compensating tax on the value of the catalogs it distributed in New Mexico. Taxpayer argues that it did not use the catalogs within the statutory meaning of "use."

{55} We employ the same principles of statutory construction that we used in our analysis of the gross receipts tax issue to determine whether our legislature intended for the compensating tax to apply to Taxpayer's distribution of catalogs. Our compensating tax imposes a 5 percent excise tax on "the privilege of using tangible property in New Mexico . . . that was . . . acquired outside [New Mexico] as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state[.]" § 7-9-7(A)(2). "'[U]se' . . . includes use, consumption or storage other than storage for subsequent sale in the ordinary course of business or for use solely outside this state." § 7-9-3(N). This definition is quite broad and does not expressly include or exclude the distribution of advertising materials.

{56} Taxpayer's specific legal argument based on the statute is that it lacked physical possession and control over the catalogs, and thus, that it did not "use" them. Taxpayer points to the facts that the catalogs were created, printed, and prepared outside New Mexico and mailed into the state from out of state. Taxpayer relies on *Phillips Mercantile Co. v. New Mexico Taxation & Revenue Department*, 109 N.M. 487, 786 P.2d 1221 (Ct. App. 1990), to support its position.

{57} In *Phillips*, this Court considered whether the taxpayer, a New Mexico retailer of goods, was subject to compensating tax on the value of catalogs, mailers, and newspaper inserts that were designed and produced out of state but distributed by an Albuquerque mailing service and New Mexico newspapers with which Phillips had contracted. *Id.* at 488, 786 P.2d at 1222. The taxpayer argued that it did not use the

advertising materials because it lacked physical possession and immediate control over the catalogs. *Id.* We rejected this argument, holding that the taxpayer exercised control over the distribution of the advertising materials and thus "used" them as contemplated by the compensating tax statute. *Id.* at 489, 786 P.2d at 1223.

{58} Taxpayer's position is that language in *Phillips* limits the application of the compensating tax to situations where the distributor of the material is located in New Mexico. Taxpayer relies on the final sentence in the following excerpt from *Phillips*.

> Phillips contends it did not use the remaining catalogs or inserts because it never had physical possession of those printed materials. Phillips offers no New Mexico authority for the proposition that 'use' requires actual physical possession and control of the property. Further, the cases Phillips relies on are distinguishable because in those cases, the in-state retailer had the advertising material shipped directly from the out-of-state seller or printer to the in-state recipient, and those materials were never in possession, in the taxing state, of a third party having a contractual relationship with the retailer.

Id. at 488, 786 P.2d at 1222. The language in the final sentence was not necessary to the holding in *Phillips* because it served only to distinguish case law cited by the taxpayer. Our focus in *Phillips* was on the taxpayer's control of the distribution of advertising materials, not on the location of the distributor. This is the appropriate focus for determining whether a taxpayer makes "use" of materials within the state because the purpose of the compensating tax is to ensure that tax be paid on items purchased

out of state and brought into New Mexico for use in this state. *Pub. Serv. Co. of N.M. v. N.M Taxation & Revenue Dep't*, 2007-NMCA-050, ¶ 11, 141 N.M. 520, 157 P.3d 85 ("New Mexico's compensating tax, as described in Section 7-9-7 of the . . . Act, is imposed on the buyer where property or services were acquired as the result of a transaction which was not initially subject to the gross receipts tax, but because of the buyer's subsequent use of such property or services, should have been subject to the gross receipts tax." (internal quotation marks and citation omitted)). Control of distribution in the state is therefore critical in determining whether there is use in the state.

{59} In this case, Taxpayer contracted for the catalogs to be designed and produced out of state and then distributed them from outside the state to potential New Mexico customers. But Taxpayer retained the right to determine where and how the catalogs were distributed in New Mexico. This is the classic situation for which the compensating tax was designed because the compensating tax seeks to prevent the importation of goods that would have been subject to gross receipts tax had they been produced or designed in New Mexico.

{60} Furthermore, the policy of the Act, as mentioned above in our analysis on the gross receipts issue, is to "protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax." § 7-9-2. To allow Taxpayer in this case to escape compensating tax would entirely frustrate this policy because it would allow out-of-state businesses (with substantial nexus for Commerce Clause analysis purposes) to avoid paying tax on

materials they distribute in state by using out-of-state suppliers of the advertising materials.

{61} Courts in other jurisdictions that have confronted the same circumstances have created several tests for determining "use." For example, in *K Mart Corp. v. South Dakota Department of Revenue*, 345 N.W.2d 55 (S.D. 1984), the South Dakota Supreme Court held that the taxpayer used advertising materials "by virtue of its ownership of the supplements and its power to determine the date of distribution and the number of copies to be distributed." *Id.* at 58; *see also Sharper Image Corp. v. Ariz. Dep't of Revenue*, 957 P.2d 1369, 1371 (Ariz. Ct. App. 1998) (holding that distribution of catalogs by third parties constituted use because the taxpayer had right or power to control distribution); *Comm'r of Revenue v. J.C. Penney Co.*, 730 N.E.2d 266, 268 (Mass. 2000) (holding that exercise of right or power over tangible property constitutes use); *J.C. Penney Co. v. Balka*, 577 N.W.2d 283, 285 (Neb. 1998) (defining use as the exercise of any right or power over tangible property). The Idaho Supreme Court, in *K Mart Corp. v. Idaho State Tax Commission*, 727 P.2d 1147, 1149 (Idaho 1986), took a broader approach to defining the word "use." The Idaho court held that the taxpayer "used" the advertising materials "for the purpose of making sales and profits," in addition to having rights and powers over the advertising materials. *Id.*

{62} Taxpayer argues that we should adopt the logic in *Sharper Image Corp. v. Michigan Department of Treasury*, 550 N.W.2d 596 (Mich. Ct. App. 1996). In that case, the Michigan court narrowly construed "use" under the Michigan statute as not including distribution. *Id.* at 598. Our statute, however, is quite broad, and we interpret it consistent with

the statutory presumption in favor of taxation. *See* § 7-9-8(A) ("To prevent evasion of the compensating tax . . . it is presumed that property bought or sold by any person for delivery into this state is bought or sold for a taxable use in this state.").

B. Imposition of the Compensating Tax Does Not Violate the Commerce Clause of the Federal Constitution

{63} Based on our discussion above in Part I.B., we hold that Taxpayer has a substantial nexus with New Mexico, and therefore, there is no violation of the Federal Constitution by the Department's imposition of compensating tax on Taxpayer's use of catalogs in New Mexico.

CONCLUSION

{64} For the foregoing reasons, we affirm the hearing officer's decision and order imposing gross receipts tax on Taxpayer's sales of computers and compensating tax on Taxpayer's use of catalogs and other advertising materials in New Mexico.

{65} **IT IS SO ORDERED.**

/s/ CYNTHIA A. FRY
CYNTHIA A. FRY, Judge

WE CONCUR:

/s/ JONATHAN B. SUTIN
JONATHAN B. SUTIN, Chief Judge

/s/ JAMES J. WECHSLER
JAMES J. WECHSLER, Judge

BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
DELL CATALOG SALES, L.P.
NM ID No. 02-416593-000
TO ASSESSMENT No. 2549063

No. 06-11

[Filed June 22, 2006]

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on December 5 and 6, 2005, before Margaret B. Alcock, Hearing Officer. Dell Catalog Sales L.P. ("DCSLP") was represented by John W. Boyd and Martha E. Mulvany, with the law firm of Freedman Boyd Daniels Hollander & Goldberg, P.A., and by Maryann B. Gall, Todd S. Swatsler and Eric Gale, with the law firm of Jones Day. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. At the close of the hearing, a briefing schedule was established and the final brief of the parties was filed on April 17, 2006, at which time the matter was submitted for decision. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Corporate Structure of Dell Computer Corporation and its Subsidiaries

1. During the audit period, Dell Computer Corporation was a holding company listed on the NASDAQ exchange (unless otherwise noted, all Findings of Fact relate to facts as they existed during the audit period). Transcript of Proceedings ("Tr.") 49.

2. Dell Computer Corporation was the parent corporation of a series of "C" corporation holding companies which, in turn, owned a series of limited partnerships that carried out the day-to-day operation of the business (references to "Dell" in these findings are to the aggregate group of corporations and partnerships). Tr. 49, 297.

3. The following limited partnerships are relevant to this proceeding:

(a) Dell USA L.P. performed general and administrative services for the other limited partnerships, who were charged for these services. Tr. 57-58, 138, 298-299, 350.

(b) Dell Products L.P. engaged in research and development and manufactured computer products. Tr. 56. Dell Products L.P. also engaged in procurement activities for other limited partnerships and, by default, Dell Products L.P.'s name was sometimes put on contracts pertaining to other Dell entities. Tr. 302.

(c) Dell Marketing L.P. sold computer products to large corporations, government agencies, and educational and healthcare institutions. Tr. 52.

(d) Dell Direct Sales L.P. sold computer products to small and medium-sized businesses and institutions. Tr. 52-53.

(e) Dell Catalog Sales L.P. sold computer products to individual consumers (Tr. 53) and operated under the business name "Dell Home Systems." Tr. 333.

4. Dell Financial Services L.P. was a 70 percent owned Dell affiliate that began leasing Dell computers to Dell customers in April 1997. Tr. 331, 334-336.

5. Each limited partnership had its own executives, officers and employees who were responsible for the policy-making and day-to-day operations of the partnership. Tr. 55-57.

6. The decision to operate Dell Computer Corporation's business through separate legal entities was motivated, at least in part, by a desire to isolate certain activities from state tax. Tr. 61, 105-106.

7. In their advertising and contracts with outside parties, the limited partnerships did not identify themselves as separate legal entities, but referred to themselves both individually and collectively as "Dell." Stipulated Exhibits ("Stip. Exs.") S-1, S-2 and S-3 (Service Contract Sales Brokerage Agreements); Stip. Exs. S-4 and S-5 (Terms and Conditions of Sale); Ex. F, last tab (Warranties and Return Policy); Ex. K (Dell Home Systems Catalog).

DCSLP's Sales Activities

8. Dell Catalog Sales L.P. ("DCSLP") was organized as a Texas limited partnership in October 1993 and began selling computer products to individual home consumers in November 1993. Joint Stipulation of Facts ("SF") ¶ 1; Tr. 292.

9. DCSLP's principal place of business was in Round Rock, Texas. SF ¶ 2.

10. DCSLP did not own or lease any real property, did not maintain any office or other place of business,

did not operate any retail stores, did not consign merchandise, and did not have any employees or independent sales agents in New Mexico. SF ¶¶ 10, 11, 13, 16, 17, 18, 19, 23.

11. DCSLP did not have any franchisee or licensee operating under its trade name or have local telephone service with local directory listings in New Mexico. SF ¶¶ 24, 27, 28.

12. DCSLP did not maintain any bank accounts or conduct credit investigations or collections in New Mexico. SF ¶¶ 15, 21.

13. DCSLP did not drop ship goods from manufacturers located in New Mexico. SF ¶ 9.

14. DCSLP purchased computers, computer peripherals and related accessories manufactured by Dell Products L.P. and other companies and resold them via national media advertising, mail order catalogs and the internet from facilities located outside New Mexico. SF ¶ 4.

15. New Mexico residents placed orders with DCSLP by contacting DCSLP directly through the internet or by telephone, facsimile, mail or e-mail. SF ¶ 6.

16. Orders from customers residing in New Mexico were accepted by DCSLP at locations outside New Mexico. SF ¶ 7.

17. Products purchased from DCSLP by customers residing in New Mexico were shipped to the customer from locations outside New Mexico by common carrier or the U.S. Postal Service. SF ¶ 8.

18. Title to merchandise DCSLP sold to customers in New Mexico transferred on shipment from a Dell facility outside New Mexico. Stip. Ex. S-5.

19. DCSLP retained the risk of loss or damage to merchandise shipped on a carrier selected by DCSLP until the merchandise was delivered to the customer in New Mexico. Stip. Ex. S-5.

20. It was DCSLP's policy to ship all merchandise directly to its customers on a carrier selected by DCSLP, and there were no procedures whereby New Mexico customers who desired to pick up their merchandise or have other carriers pick up their merchandise at Dell warehouses or other shipping locations could do so. Stip. Ex. S-8 at 6-7.

Warranty on Dell Products Sold by DCSLP

21. Dell products sold by DCSLP were covered by a limited warranty provided by the manufacturer, Dell Products L.P. SF ¶ 29.

22. The purchaser of Dell-brand computer equipment from DCSLP did not receive any manufacturer warranties in addition to Dell Products L.P.'s warranty. SF ¶ 31.

23. Neither Dell Products L.P. nor DCSLP had any obligation to provide on-site repair services to a customer who purchased a Dell computer from DCSLP. SF ¶ 45.

24. Dell Products L.P.'s warranty covered parts and labor during the first year and parts only in years two and three. Tr. 367; Ex. F, last tab.

25. The warranty was a "return-to-factory" warranty that required the customer to pack up and return the defective product to Round Rock, Texas, at the customer's expense, for repair or replacement. Tr. 84-85; Ex. F, last tab.

26. In cases where a customer was willing to replace a defective part himself, Dell Products L.P. mailed a replacement part to the customer in a box

that contained a prepaid return shipping label. Tr. 351.

27. Dell Products L.P. owned all parts removed from Dell computers. Stip. Ex. S-5, second page; Ex. F, last tab.

28. Customers who failed to return a defective part removed from a Dell computer within 30 days were charged for the part. Stip. Ex. S-5, second page; Ex. F, last tab.

Third-Party Service Agreements

29. In the mid 1980s, customers began asking Dell to provide them with on-site repair service. Tr. 87.

30. Many Dell customers did not have the expertise to fix their computers themselves and did not want the inconvenience of returning the computer to Texas under the return-to-factory warranty or trying to find a reliable local service technician. Tr. 87.

31. After considering the problem, Dell authorized a third-party service provider to repair Dell computers under service contracts that Dell sold to its customers, keeping a portion of the sales price as a commission. Tr. 87-91, 95-96.

32. In 1986, Dell chose Honeywell Bull as the company to provide on-site repair service to the owners of Dell computers. Tr. 90.

33. The relationship with Honeywell Bull ended when Dell began receiving complaints of poor service from its customers, who blamed Dell for selling them the service contracts. Tr. 92.

34. In 1989, Dell selected Xerox to provide repair service to Dell customers. Tr. 93-94.

35. That relationship ended when Xerox wanted more money for each of the service contracts Dell

sold to its customers and Dell concluded that increasing the price would reduce the number of contracts sold and make its customers unhappy. Tr. 97.

36. After the agreement with Xerox expired, Dell entered into three successive Service Contract Sales Brokerage Agreements ("Brokerage Agreements") with BancTec USA, Inc. under which Dell sold BancTec service contracts to its customers and BancTec acted as the exclusive provider of on-site repair service for Dell computer products. Stip. Exs. S-1, S-2 and S-3; Tr. 338-339. (Because the terms of the three Brokerage Agreements are virtually identical, references to the record will be limited to the July 1995 agreement admitted as Stip. Ex. S-2).

BancTec's Relationship with DCSLP and Other Dell Entities

37. BancTec USA, Inc. ("BancTec") was a Delaware corporation with its principal place of business in Dallas, Texas. SF ¶ 39.

38. From the beginning of the audit period until 1999, BancTec was a wholly-owned subsidiary of BancTec, Inc., a New York Stock Exchange company headquartered in Dallas, Texas. SF ¶ 40.

39. In 1999, BancTec became a privately held company. SF ¶ 41.

40. DCSLP was one of the Dell entities that marketed and sold BancTec service contracts under the terms of the Brokerage Agreements. SF ¶ 53; Ex. K.

41. DCSLP had no ownership interest in BancTec. SF ¶ 42.

42. BancTec had no ownership in DCSLP or any other Dell entity. SF ¶ 43.

43. BancTec did not solicit sales or orders on behalf of DCSLP or have the authority to bind DCSLP

to any legal obligations in New Mexico. SF ¶ 46; Tr. 201-202.

44. BancTec, and not DCSLP, was responsible for any property damage (such as a scratched piece of furniture) that occurred in the course of a BancTec service technician's on-site service call. SF ¶¶ 48, 49; Tr. 202.

45. The amount of revenue BancTec received for each service contract sold by DCSLP was determined by a formula which, among other things, took into account the number of on-site service calls made by BancTec during the previous 90-day period and whether BancTec had met the required performance criteria set out in the Brokerage Agreements. SF ¶ 52; Stip. Ex. S-2 at 17.

46. DCSLP retained the difference between the retail price DCSLP charged its customers for each service contract and the amount paid to BancTec under the formula set out in the Brokerage Agreements. SF ¶ 54.

47. DCSLP's sale of service contracts on Dell computers was profitable to both BancTec and DCSLP. SF ¶ 58; Tr. 236.

48. Dell USA L.P. acted as BancTec's agent for purposes of registering BancTec with the New Mexico Taxation and Revenue Department and reporting and paying New Mexico gross receipts taxes on DCSLP's sale of service agreements to New Mexico customers. SF ¶ 50.

49. DCSLP did not provide BancTec with information concerning the New Mexico gross receipts taxes reported and paid on DCSLP's sales of BancTec service contracts, but would have provided such information if requested by BancTec. SF ¶ 51.

DCSLP's Sale of BancTec Service Contracts

50. A customer who wished to purchase a service contract on a Dell computer had to purchase the contract through DCSLP. Tr. 227-228.

51. DCSLP customers could purchase a service contract at the same time they purchased a Dell computer or could purchase a contract from DCSLP any time after the purchase of a computer. SF ¶ 44.

52. The only service contract DCSLP offered to its customers was a BancTec service contract, but BancTec's name did not appear in DCSLP's catalogs advertising the availability of the contracts. Tr. 338-339; Ex. K.

53. The service contracts between BancTec and DCSLP customers had to follow the form set out in the Brokerage Agreements. DCSLP had the right to revise the contract from time to time "to facilitate ease of understanding by Customer." Stip. Ex. S-2 at 31.

54. DCSLP set the price for the BancTec service contracts DCSLP sold to its customers. SF ¶ 53.

55. As a marking tool, DCSLP often "bundled" the cost of the service contract into a single price charged for a complete computer setup, including such components as the monitor, processor and hard drive. Ex. K; Tr. 346.

56. BancTec was required to accept all service contracts sold by DCSLP. Stip. Ex. S-2 at 5.

57. Approximately 75 percent of DCSLP's New Mexico customers purchased a BancTec service contract. SF ¶ 55.

Procedures for On-Site Service Calls

58. When a New Mexico customer with a BancTec service contract had a problem with a Dell computer, the customer could not contact BancTec directly, but was first required to call Dell Customer Technical Support ("Dell Tech Support"). SF ¶¶ 56, 57.

59. Dell Tech Support was located outside New Mexico and was staffed 24 hours a day, seven days a week, by employees who worked for Dell USA L.P. SF ¶¶ 34, 35; Tr. 350.

60. Dell USA L.P. charged DCSLP for the technical support services provided to DCSLP customers. Tr. 350.

61. In the majority of cases, Dell Tech Support was able to solve a customer's problem over the telephone. SF ¶ 37.

62. Only after Dell Tech Support diagnosed a customer's computer problem and determined that it could not be corrected over the telephone did Dell Tech Support authorize BancTec to dispatch a technician to the customer's address for service. SF ¶ 56.

63. During the audit period, Dell Tech Support dispatched BancTec technicians on 1,273 service calls and installation visits to customers in New Mexico. Ex. E; Tr. 362-365.

64. The Brokerage Agreements set out detailed "Service Call Procedures" that BancTec was required to follow. Stip. Ex. S-2 at 30.

65. BancTec was required to contact DCSLP customers within a specified time period after receipt of a dispatch notice from Dell Tech Support. With regard to same business day service, for example, a BancTec technician was required to contact the

customer within 30 minutes of the dispatch notice. Stip. Ex. S-2 at 30.

66. BancTec was required to track every service call against targeted arrival times and to cooperate with DCSLP "to establish and implement effective escalation or remedial procedures to produce optimum customer satisfaction." Stip. Ex. S-2 at 30.

67. BancTec's service technicians were required to undergo training and meet the technical skill levels set out in the Brokerage Agreements. Stip. Ex. S-2 at 30.

68. BancTec's service technicians were required to conduct themselves in a manner that would "professionally and positively represent the parent company as well as Dell Computer Corporation and other partners." Stip. Ex. S-2 at 20.

69. After determining the nature of a customer's computer problem, Dell Tech Support shipped the replacement parts needed to repair the computer to an area within Dell's warehouse in Austin, Texas, that was subleased by BancTec. Stip. Ex. S-2 at 2, 7.

70. BancTec was prohibited from using replacement parts other than the parts supplied by Dell Tech Support. Ex. S-2 at 29.

71. BancTec was prohibited from using the replacement parts for any purpose other than servicing the computers of Dell customers and could not "repair, scrap or sell any faulty System parts or any spare parts acquired from Dell to any party other than Dell or Customers." Stip. Ex. S-2 at 29-30.

72. BancTec was not in the business of selling computer parts. Tr. 206-207, 213-215.

73. BancTec acted as a bailee of the replacement parts provided by Dell Tech Support and was liable

to Dell for any loss or damage to those parts while they were in BancTec's possession. Tr. 206-207, 213-215.

74. Once on-site, the BancTec technician verified the advisory diagnosis provided by Dell Tech Support; if the technician ran into a problem, the technician was required to call Dell Tech Support for additional assistance. Stip. Ex. S-2 at 30.

75. When a service call was completed, the BancTec technician closed the call on the BancTec system, noting parts used, and this information was electronically uploaded to Dell. Stip. Ex. S-2 at 30.

76. In the event a customer was not satisfied with the services performed by BancTec, the customer registered a complaint with Dell Tech Support and not with BancTec. Dell Tech Support then acted as an intermediary, reporting the problem to BancTec management for resolution. SF ¶ 57.

77. BancTec warranted its services to DCSLP, but disclaimed all warranties in its contracts with DCSLP customers. Stip. Ex. S-2 at 31, 24.

78. If BancTec's "service level performance" as set out in the Brokerage Agreement fell below 95% for two consecutive months, DCSLP had the exclusive right to take over BancTec's service obligations under all of BancTec's existing service contracts with DCSLP customers, or to assign BancTec's service obligations to a third party chosen by DCSLP. Stip. Ex. S-2 at 6-7.

79. The availability of in-home service was an important factor in establishing DCSLP's market for sales. Tr. 165.

DCSLP Catalogs

80. Beginning in July 1997, DCSLP began mailing catalogs to potential customers in New Mexico under the name "Dell Home Systems." Tr. 300-301, 309; Ex. K.

81. DCSLP did not use vendors in New Mexico to design, prepare, print, store, or mail the catalogs. SF ¶ 22.

82. DCSLP's catalogs were prepared and mailed into New Mexico from outside the state under the terms of an Advertising Agency Master Services Agreement ("Advertising Agreement") entered into between Dell Products L.P. and Rapp Collins Worldwide. Ex. 17.

83. DCSLP's sales were supplemented by advertising in national magazines, such as specialty magazines dealing with computers, and national newspapers. SF ¶ 26.

84. DCSLP did not enter New Mexico to purchase or display advertising for itself or others. SF ¶ 25.

Audit and Assessment

85. In July 1999, the New Mexico Taxation and Revenue Department ("Department") conducted an audit of DCSLP in Round Rock, Texas. Tr. 300.

86. The Department determined that DCSLP had never registered to do business in New Mexico and had never reported or paid gross receipts or compensating taxes to New Mexico. SF ¶ 14, Ex. A.

87. Dell's legal and accounting staff made the determination as to which Dell entities, including DCSLP, were required to register and pay tax to New Mexico and other states.

88. On June 28, 2000, the Department issued a Notice of Assessment of Taxes and Demand for Payment to DCSLP in the total amount of $1,817,693.43, representing $1,140,735.71 of gross receipts tax and $31,908.69 of compensating tax, plus penalty and interest, for the period January 1993 through June 1999. Joint Prehearing Statement at 1.

89. On September 22, 2000, pursuant to an extension of time granted by the Department, DCSLP filed a written protest to the assessment. Joint Prehearing Statement at 1.

ISSUES TO BE DECIDED

Issue I. Whether DCSLP was selling property in New Mexico and is therefore liable for New Mexico gross receipts tax on its sales to New Mexico customers.

Issue II. Whether imposition of New Mexico gross receipts tax on DCSLP's sales to New Mexico customers violates the Commerce Clause of the United States Constitution.

Issue III. Whether DCSLP is liable for compensating tax on catalogs mailed into New Mexico.

Issue IV. Whether DCSLP is liable for the ten percent negligence penalty on its failure to report and pay New Mexico gross receipts and compensating taxes during the audit period.

BURDEN OF PROOF

There is a statutory presumption that any assessment of tax made by the Department is correct. NMSA 1978, § 7-1-17(C). *See also, MPC Ltd. v. New Mexico Taxation & Revenue Department*, 2003 NMCA 21, ¶ 13, 133 N.M. 217, 62 P.3d 308. Accordingly, it is DCSLP's burden to present evidence and legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it.

DISCUSSION

Issue I: Whether DCSLP was selling property in New Mexico and is therefore liable for New Mexico gross receipts tax on its sales to New Mexico customers.

DCSLP maintains that it is not liable for New Mexico gross receipts tax on its sales of computers and related products to customers located in New Mexico because those sales did not take place in New Mexico. DCSLP bases this conclusion on the "Terms and Conditions of Sale" governing the transactions, which provided that title to goods passed to the buyer "on shipment from Dell's facility" in Texas. Stip. Ex. S-5 ¶ 5. The Department focuses on another provision of the sales agreement, which stated that "loss or damage that occurs during shipping by a carrier selected by Dell is Dell's responsibility." *Id.* DCSLP concedes that all of the goods it sold during the audit period were shipped to its customers on a carrier selected by DCSLP and that "there are no procedures whereby customers who desired to pick up their merchandise or have other carriers pick up their merchandise at Dell warehouses or other shipping locations out of state could do so." Stip. Ex. S-8 at 6-7. Because DCSLP retained both risk of loss and control of the goods it sold until the goods were physically delivered to its customers in New Mexico, the Department argues that DCSLP owes gross receipts tax on those sales.

Gross receipts tax is imposed on the receipts of any person engaging in business in New Mexico. NMSA 1978, § 7-9-4. The term "gross receipts" is defined, in pertinent part, as "the total amount of money or the value of other consideration received from selling property in New Mexico . . . ." NMSA

1978, § 7-9-3.5(A)(1).[1] In *Kmart Corporation v. Taxation and Revenue Department*, 2006-NMSC-006, ¶ 18, 131 P.3d 22, the New Mexico Supreme Court held that the gross receipts tax applies "when the selling of property takes place within the borders of New Mexico." Pursuant to NMSA 1978, § 7-9-3(A), "'selling' means a transfer of property for consideration." The question to be addressed is whether DCSLP's sales agreement with its New Mexico customers required DCSLP to transfer property to those customers within the borders of New Mexico.

DCSLP argues that the transfer of computers and related products sold to New Mexico customers occurred when title passed to the customers at DCSLP's facility in Texas. In support of its argument, DCSLP relies on the definition of "sale" in NMSA 1978, § 55-2-106(1) of New Mexico's Uniform Commercial Code ("UCC"), which provides that a sale consists in the passing of title from the seller to the buyer for a price. DCSLP then concludes that "[t]he terms 'transfer of property' used in the Tax Act and 'passing of title' used in the UCC are interchangeable." Post-Hearing Brief at 7. As discussed below, there is no authority to support this conclusion.

A. Application of the UCC. Article 2 of the UCC applies to the rights and remedies of the parties to a sale of goods. As noted in the official comments to § 55-2-101:

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[1] This is the definition of gross receipts in effect during the period at issue in this protest. As of July 1, 2006, the definition has been amended to read: "the total amount of money . . . received from selling property located in New Mexico. . . ." H.B. 583, 47th Legislature, Regular Session (2006).

> The arrangement of the present article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it *without resorting to the idea of when property or title passed or was to pass as being the determining factor.* The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character. (emphasis added).

This comment is further explained as follows:

> Like the common law, the Uniform Sales Act ("U.S.A.") that preceded the U.C.C. was predicated on the notion that, absent a convincing reason to the contrary, the central problem-solver for questions involving risk of loss, action for price, the place and time for measuring damages, the power to replevy goods, and a myriad of other questions was the transfer of title, meaning who took title and when. As discussed elsewhere, the drafters of the U.C.C. rejected this concept in favor of a more flexible contract approach that looks at the performance and intentions of the parties. Consequently, the U.C.C., for the most part, decides legal consequences based on what the parties intended rather than on some arbitrary event such as the formal passage of title. As commerce in goods became more complicated, title as a problem-solving modality became too simplistic.

Michael Madison, *The Real Properties of Contract Law*, 82 B.U.L. Rev. 405, 473-474 (April 2002) (foot-

notes omitted). As a result of this change in focus, Article 2 of the UCC is divided into subparts. In analyzing the rights of parties to a sales agreement and other affected third parties, such as creditors, each component of the transaction must be analyzed in accordance with the specific provisions of the Code intended to address that particular situation.

Part 4 of Article 2 addresses the passage of title. As a general rule, title passes to the buyer at the time and place at which the seller completes its performance with reference to the physical delivery of the goods:

> (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require the seller to deliver them at destination, title passes to the buyer at the time and place of shipment; but
>
> (b) if the contract requires delivery at destination, title passes on tender there;

NMSA 1978, § 55-2-401(1). Under this general rule, the terms and conditions governing DCSLP's sale of goods to New Mexico customers would create a destination contract and title to the goods would pass upon physical delivery to the customer in New Mexico. As an alternative to the general rule, however, § 55-2-401(1) provides that "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties." In this case, the agreement between DCSLP and its customers stated that title passed to the customer at DCSLP's facility in Texas, even though DCSLP retained control and risk of loss of the goods until delivery to the customer's home state.

The sales agreement between DCSLP and its customers governs any dispute that might arise between the parties. It is clear, however, that the UCC is only intended to address rights of private parties and is not intended to override governmental or public determinations of what constitutes a sale. Official Comment 1 to § 55-2-401 states that:

> This article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not "title" to the goods has passed. . . . This section, however, *in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon a "sale" or upon location of "title" without further definition*. . . . (emphasis added).

The fact that the UCC defines a sale as "the passing of title from the seller to the buyer for a price" and allows the parties to designate where such title passes, does not determine where a sale takes place for state tax purposes. In *Mossberg-Hubbard v. Norberg*, 432 A.2d 1176, 1179 (R.I. 1981), the Rhode Island court rejected the taxpayer's assertion that no sales tax was due on its sale of equipment to Rhode Island customers because the parties had agreed that the transfer of goods was f.o.b. an out-of-state location:

> We hold, however, that Mossberg-Hubbard's contention that the Uniform Commercial Code is applicable is misplaced. As we have stated previously, "when an administrative agency has interpreted the parameters of particular statutory terms in a field over which it has been given authority, it is not bound by the meaning ascribed to similar concepts in the [Uniform Com-

> mercial] Code." *Rice Machinery, Inc. v. Norberg*, 120 R.I. 542, 391 A.2d 66, 74 n.12 (1978); G.L. 1956 (1969 Reenactment) § 6A-2-401, Comment 1.

The court further noted:

> For us to rule that when a transfer of possession is made in Rhode Island it is not subject to a sales tax, merely because the goods purchased are to be taken to another state in which title will pass according to the contract between the parties, would allow easy avoidance of a tax by a seller who would simply arrange for the buyer to take the goods elsewhere. Furthermore, to approve such a practice would give rise to untold chaos in the administration of the tax laws and to extensive losses of state sales-tax revenue.

Id. See also, Sonic Industries, Inc. v. State, 2000-NMCA-087, 129 N.M. 657, 11 P.3d 1219, *cert. granted*, 129 N.M. 519, 10 P.3d 843 (2002) (parties to a sale in New Mexico cannot avoid gross receipts tax simply by stepping across the state line to sign the sales agreement). *Continental Inn v. New Mexico Taxation and Revenue Department*, 113 N.M. 588, 591, 829 P.2d 946, 949 (Ct. App. 1992) (private contracts regarding payment of tax on a sale cannot shift the legal incidence of tax as between the state and the taxpayer).

In this case, as in *Mossberg-Hubbard*, New Mexico has specific laws and regulations governing the application of state taxes. It is this legal framework —not the legal framework governing the rights and remedies of private parties under the UCC—that must be applied to determine DCSLP's liability for New Mexico gross receipts tax. *See also, Amoco Production Company v. New Mexico Taxation & Revenue Department*, 2003-NMCA-92, ¶ 13, 134 N.M. 162, 74

P.3d 96 (taxpayers' attempt to apply federal definition of processing "fails because we must evaluate the definition of 'processing' in the context of the Act and not in the context of the calculation of mineral royalty payments"); *Rauscher, Pierce, Refsnes, Inc. v. Taxation & Revenue Department*, 2002-NMSC-13, ¶ 21, 132 N.M. 226, 46 P.3d 687 (taxpayer's liability for gross receipts tax to be resolved "not by deciding whether Rauscher would be categorized as a dealer or broker under federal law, but by whether the term 'broker' as it appears in Section 7-9-3(F)(1)(b) encompasses Rauscher's role in the mutual fund transactions at issue").

Application of New Mexico Tax Law. NMSA 1978, § 7-9-3(A) of New Mexico's Gross Receipts and Compensating Tax Act defines the term "selling" as "a transfer of property for consideration:" Although DCSLP argues that this refers to a transfer of title and does not include a transfer of possession of the property being sold, there is nothing in the statute to support such a limited interpretation. When a statute does not define its terms, the rules of statutory construction require that those terms be interpreted in their common, ordinary sense. *Security Escrow Corp. v. Taxation and Revenue Department*, 107 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct. App. 1988). *See also, State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 111, 1114 (1998) (courts are to give the words used in a statute their ordinary meaning unless the legislature indicates a different intent.). In *H-B-S Partnership v. Aircoa Hospitality Services, Inc.*, 2005-NMCA-68, ¶ 22, 137 N.M. 626, 114 P.3d 306, the New Mexico Court of Appeals had occasion to interpret the term "transfer" in the context of a partnership agreement and found that:

> Black's Law Dictionary defines the verb "transfer" as, "1. To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of." Black's Law Dictionary 1536 (8th ed. 2004). Black's defines the noun "transfer" as "1. Any mode of disposing of or parting with an asset or an interest in an asset. . . . The term embraces every method—direct or indirect . . . of disposing of or parting with property or with an interest in property." *Id.* at 1535. Thus, the general legal definition of "transfer" is quite broad . . . .

Giving the word its ordinary meaning, a "transfer" of property includes a transfer of physical possession of property, as well as a transfer of title to property. DCSLP's contention that "by every measure, a 'sale' takes place where title passes" is incorrect. Post-Hearing Brief at 7. In the area of state tax law—as opposed to commercial law—the majority of states define a "sale" as any transfer of title *or* possession, *or* both, for a consideration.[2] *See, e.g.*, Ark. Code Ann. § 26-52-103(9)(A) (sale means "the transfer of either the title or possession . . . for a valuable consideration of tangible personal property"); Fla. Stat. Ann. § 212.02(15) (sale includes any "transfer of title

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[2] Although most states impose a sales tax rather than a gross receipts tax, the United States Supreme Court has made no distinction between such taxes when determining a state's right to tax sales in interstate commerce. *See, International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 348 (1944) ("[I]t could hardly be held that Indiana lacked constitutional authority to impose a sales tax or a use tax on these transactions. But if that is true, a constitutional difference is not apparent when a 'gross receipts' tax is utilized instead.").

or possession, or both . . . of tangible personal property for a consideration"); La. R.S. § 47:301(12) (sale means any "transfer of title or possession, or both . . . of tangible personal property, for a consideration); N.J. Stat. Ann. § 54:32B-2(f) (sale means any "transfer of title or possession or both . . . for a consideration"); N.Y. Tax Law § 1101(b)(5) (sale includes any "transfer of title or possession or both . . . for a consideration"); Ohio Rev. Code Ann. § 5739.01(B)(1) (sale includes all "transactions by which title or possession, or both, of tangible personal property, is or is to be transferred"); 68 Okl. St. § 1352(21) (sale means "the transfer of either title or possession of tangible personal property for a valuable consideration"); Tex. Tax Code Ann. § 151.005 (sale means "any of the following when done or performed for consideration: (1) a transfer of title or possession of tangible personal property"). In Jerome R. Hellerstein and Walter Hellerstein, *State Taxation II*, ¶ 18.02[2][e] at 18-14 (3rd ed. 2003), the authors note that:

> As a matter of statutory construction, it is clear that the transfer-of-title-or-possession rule of taxability will subject to tax the transfer of possession to goods within the state even though title to the property has not passed or title has passed elsewhere.

See also, Mossberg-Hubbard, supra; *IBM v. Oklahoma Tax Commission*, 853 P.2d 770, 772 (Okla. 1993) (although transfer of title passed outside Oklahoma, transfer of possession occurred within the state and the sale was subject to tax in Oklahoma).

The United States Supreme Court has consistently upheld the imposition of state sales taxes based on the place where consummation of a sale occurs. In *Oklahoma Tax Commission v. Jefferson Lines*, 514

U.S. 175, 184 (1995) the Court noted that: "It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." In support of this proposition, the Court cited to its earlier decision in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 49 (1940), which upheld New York's tax on the sale of coal shipped into New York from Pennsylvania, finding that the taxable event was the transfer of possession to the purchaser within the state, "regardless of the time and place of passing title. . . ." In *International Harvester Co. v. Department of the Treasury*, 322 U.S. 340 (1944), the Court again held that a state may tax gross receipts from interstate transactions consummated within its borders:

> The fact that the sales in Class C are made by an out-of-state seller and that the contracts were made outside the State is not controlling. Here as in the *Wood Preserving Corp.* case, delivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. . . .

Id., 322 U.S. at 345.

In its Post-Hearing Reply Brief (page 3), DCSLP cites to *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (U.S. 1944) for the proposition that New Mexico's gross receipts tax cannot apply to a sale where title passes and goods are shipped from outside the state. DCSLP fails to recognize that the Court's decision in *McLeod* was based on a finding that the sale in that case was consummated prior to shipment. The Court

noted that this finding explained the difference between its decision in *McLeod*, which struck down Arkansas' sales tax on goods shipped into the state from Tennessee, and *Berwind-White*, *supra*, which upheld New York's sales tax on goods shipped into the state from Pennsylvania, stating: "In *Berwind-White* the Pennsylvania seller completed his sales in New York; in this case the Tennessee seller was through selling in Tennessee." *McLeod*, 322 U.S. at 330. In this case, as in *Berwind-White*, DCSLP's sales were consummated when merchandise was physically delivered to its customers. While title may have passed in Texas, DCSLP had not completed its bargain with its New Mexico customers and was not "through selling" until the customer received the goods within this state.

In *Proficient Food v. New Mexico Taxation and Revenue Department*, 107 N.M. 392, 758 P.2d 806 (Ct. App.), *cert. denied*, 107 N.M. 308, 756 P.2d 1203 (1988), the New Mexico Court of Appeals recognized that the consummation of a sale in New Mexico supports the imposition of the gross receipts tax. The taxpayer was a California corporation which operated a restaurant supply business with a warehouse in Texas. The taxpayer had no place of business in New Mexico and had no employees, agents or salesmen residing in the state. Orders for food and supplies from New Mexico customers were taken by the taxpayer over the telephone, and all sales were invoiced to and paid by the customers' corporate headquarters located outside New Mexico. Once an order was accepted, the taxpayer used its own trucks to deliver the goods from its Texas warehouse to the New Mexico customer. Like DCSLP in this case, the taxpayer in *Proficient Food* argued that it was not

subject to New Mexico gross receipts tax because it was not selling property in New Mexico. Instead, the taxpayer maintained that its selling activities were concluded when the order was accepted and the goods were identified and placed in transit from its Texas warehouse. The court found otherwise, stating:

> The gross receipts tax assessed against PFC was limited to the receipts from the products sold by it to New Mexico restaurants. The Act defines gross receipts as the "total amount of money . . . received from selling property in New Mexico." NMSA 1978, § 7-9-3(F) (Repl.1986). The Act defines selling as "any transfer of property for consideration." § 7-9-3(B). Although not explicitly stated in the stipulated facts, the hearing officer determined it was reasonable to infer that the products delivered to the restaurants in New Mexico were sold in New Mexico, despite the fact that the invoices were handled by the corporate offices outside the state. *See Pittsburgh & Midway Coal Mining Co. v. Revenue Div., Taxation & Revenue Dep't.*, 99 N.M. 545, 660 P.2d 1027 (Ct. App. 1983) (sale occurred in New Mexico when title and risk of loss pass to purchaser in New Mexico and tax may be imposed on those sales). We agree.

Proficient Food, *supra*, 107 N.M. at 395, 758 P.2d at 809.

A similar result was reached in *Siemens Energy & Automation, Inc. v. Taxation & Revenue Department*, 119 N.M. 316, 889 P.2d 1238 (Ct. App. 1994), which involved the gross receipts tax liability of an out-of-state manufacturer with a sales office in Albuquerque but no manufacturing facilities within the state. A high percentage of Siemens' sales were to national

distributors who asked Siemens to ship equipment directly to their customers. The court of appeals held that when three-party interstate transactions "involve a New Mexico shipping destination," the seller is entitled to accept a Multistate Tax Commission certificate from its purchaser to establish that the sale is exempt from New Mexico gross receipts tax. *Siemens*, 119 N.M. at 317, 889 P.2d at 1239. Despite the fact that many of Siemens' customers had voluntarily paid compensating tax on the value of the goods ordered, the court held that the gross receipts tax—not the compensating tax—applied to the sale of equipment delivered to customers in New Mexico.

A third New Mexico case supporting the conclusion that a "sale" for state tax purposes depends on where risk of loss passes, as well as where title passes, is *Pittsburgh & Midway Coal Mining Co. v. Revenue Division, Taxation & Revenue Department*, 99 N.M. 545, 660 P.2d 1027 (Ct. App. 1983), *cert. quashed*, 99 N.M. 644, 662 P.2d 645 (1983). In that case, the taxpayer challenged the imposition of gross receipts tax on its sale of coal to an out-of-state buyer. Based on its finding that both title and risk of loss passed to the buyer in New Mexico when the coal was loaded onto railroad cars for transportation outside the state, the court held that the sale was subject to tax in New Mexico, stating: "We conclude that the question of title *and delivery of coal in New Mexico* is a positive factor upon which to determine that the tax does not interfere with the Commerce Clause of the U.S. Constitution." *Id.*, 99 N.M. at 555, 660 P.2d at 1037 (emphasis added). In reaching its conclusion, the court also relied on a Department regulation (now codified at 3.2.213.12 NMAC) which provided that "receipts of New Mexico sellers from sales of

property to nonresidents of New Mexico who accept delivery of the property in New Mexico are not transactions in interstate commerce, and are subject to Gross Receipts Tax." *Id.*, 99 N.M. at 552, 660 P.2d at 1034. This regulation and the holdings in *Proficient Food*, *Siemens*, and *Pittsburgh & Midway* establish that—subject to the constitutional limitations discussed in the next section—New Mexico follows the approach of most other states in imposing tax on sales where transfer of possession of tangible personal property occurs within the state.

In arguing that transfer of title alone establishes the location of a sale, DCSLP ignores the New Mexico cases dealing with sales of goods and relies on the New Mexico Supreme Court's decisions in *Kmart Corporation*, *supra*, and *TPL, Inc. v. New Mexico Taxation & Revenue Department*, 2003-NMSC-7, 133 N.M. 447, 64 P.3d 474, neither of which involved the sale of tangible personal property. In *Kmart*, the supreme court held that the transfer of a license to use intangible personal property in New Mexico was not subject to New Mexico gross receipts tax because both parties to the license agreement were located in Michigan and all activity related to the license agreement took place in Michigan. Based on these facts, the court concluded that "[w]ith all critical elements and parties being in Michigan, it cannot be said that this transaction involved the sale of property within the borders of New Mexico." 2006-NMSC-006, ¶ 18. The facts of this case are quite different. Each sales transaction was initiated when a buyer located in New Mexico mailed an order form, picked up a telephone, or turned on a computer in New Mexico and placed an order for DCSLP's products. Each transaction was consummated when

DCSLP completed physical delivery of the ordered products to the customer in New Mexico. In contrast to the facts in *Kmart*, one of the two parties and many of the critical elements involved in DCSLP's sales of tangible goods were located in New Mexico.

With regard to *TPL*, *supra*, DCSLP relies on the following sentence taken from the New Mexico Supreme Court's opinion: "In cases involving the sale of goods, the place of transfer of title determines where the transaction is taxable." 2003-NMSC-7, ¶ 26. In order to understand the import of this sentence, however, it must be read in context, which DCSLP has failed to do:

> Transfer of title occurred in New Mexico because the inert munitions were in New Mexico at the time the transfer of title took place. *See Pittsburgh & Midway Coal Mining Co. v. Revenue Div., Taxation & Revenue Dep't*, 99 N.M. 545, 554, 660 P.2d 1027, 1036 (Ct. App. 1983) (citing *State Tax Comm'n v. Pac. States Gas Iron Co.*, 372 U.S. 605, 10 L. Ed. 2d 8, 83 S. Ct. 925 (1963)). In cases involving the sale of goods, the place of transfer of title determines where the transaction is taxable. *Id.* ("Where a vendor sells property, and passage of title and delivery occurs in the vendor state, that state can levy and collect the sales tax on that transaction."). Thus, if this case involved the sale of goods, New Mexico would have taxing authority.

2003-NMSC-7, ¶ 26. The first sentence of this passage sets out the court's conclusion that title to the munitions transferred to TPL in New Mexico *because the munitions were already in TPL's possession within the state.* This does not support DCSLP's

assertion that transfer of title, by itself, determines the place of sale.

As the Department points out in its Post-Hearing Response Brief (pages 6-7), the discussion in *TPL* concerning title to the demilitarized munitions was *dicta*. The holding of the case was that the *intangible* product of a service performed on property shipped into New Mexico by an out-of-state buyer was not initially used by or delivered to the buyer in New Mexico when the buyer had no employees, agents, or other physical presence in the state. This holding does not support DCSLP's argument that its sales of tangible personal property to New Mexico buyers who had no employees, agents, or other physical presence in Texas should be treated as Texas sales. Although DCSLP's terms and conditions of sale provided for passage of title at its Texas facility, the buyer acquired no control over the property at that point. To the contrary, there were "no procedures whereby customers who desired to pick up their merchandise or have other carriers pick up their merchandise at Dell warehouses or other shipping locations out of state could do so." Stip. Ex. S-8 at 7. Because DCSLP retained both risk of loss and control over its products until they were physically delivered to its customers in New Mexico, DCSLP had gross receipts from "selling property in New Mexico" under NMSA 1978, § 7-9-3.5(A).

Issue II. Whether imposition of New Mexico gross receipts tax on DCSLP's sales to New Mexico customers violates the Commerce Clause of the United States Constitution.

DCSLP argues that even if the Department had the requisite statutory authority to tax DCSLP's sales to New Mexico customers, the limitations

imposed by the Commerce Clause of the federal constitution bars taxation in this case.[3] In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court held that a state tax on foreign corporations performing exclusively interstate business will not violate the protections of the Commerce Clause if the tax meets the following four-part test: (1) a sufficient nexus exists between the activity being taxed and the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to services provided by the state.

A. Fair Apportionment. A state tax on interstate commercial activity is "fairly apportioned" if it is both internally and externally consistent. *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989). *See also, Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983); *Jefferson Lines, supra*, 514 U.S. 175, 185. A tax is internally consistent if "the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Id.* The internal consistency test "simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* The external consistency test looks at the in-state business activity on which the tax is imposed and the practical or economic effect of the tax to determine "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects

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[3] DCSLP has not challenged the Department's assessment on due process grounds.

the in-state component of the activity being taxed." *Goldberg, supra*, 488 U.S. at 262.

(1) Internal Consistency. As discussed in the previous section, most states define a "sale" for purposes of state taxation as any transfer of title or possession, or both, for a consideration. On its face, such a statutory scheme appears to violate the fair apportionment test because it could result in multiple taxation in cases where transfer of title takes place in one state and transfer of possession takes place in another. The possibility of double taxation is obviated, however, by the exemption (or deduction) states routinely provide for sales of property shipped outside the state. As discussed in Walter Hellerstein, Michael J. McIntyre and Richard D. Pomp, *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 Tax L. Rev. 47, n. 63 (Fall 1995):

> Despite the theoretical risk of multiple taxation to which interstate commerce could be exposed under many state sales taxes, *see* note 62, most states, in fact, exempt from tax sales of goods for out-of-state delivery, even when title passes within the state. . . . As a practical matter, then, a purchaser in State A who purchases goods from a seller in State B ordinarily will not be subject to State B's sales tax, unless the purchaser comes into State B to pick up the goods. *See id.* In that event, of course, State A has no power to impose a tax on the sale, because transfer of neither ownership nor possession occurs in State A.

In this case, the taxation of DCSLP's sales to out-of-state customers illustrates the way in which existing state tax schemes operate to avoid the danger of multiple taxation on interstate sales. Under Tex. Tax Code § 151.005, a "sale" is defined to include the

"transfer of title or possession of tangible personal property" for consideration. Based on this definition, DCSLP should have been liable for Texas sales tax on its sales to New Mexico customers because title to the goods transferred in Texas. DCSLP acknowledges, however, that it never paid tax to Texas on these sales because they "constituted sales in interstate commerce" and "DCSLP had no obligation to pay and the State of Texas did not impose any sales tax on such transactions." Stip. Ex. S-8 at 8. This exemption for interstate sales is found in Tex. Tax Code § 151.330(a), which provides that the "sale of tangible personal property that under the sales contract is shipped to a point outside this state is exempted from the sales tax. . . ."

New Mexico's gross receipts tax follows the same pattern. DCSLP is liable for gross receipts tax on its sales into New Mexico because those sales are consummated when DCSLP transfers physical possession of the goods to its customers within the state. Had the location of the parties been reversed, DCSLP's receipts on the sale of property shipped from New Mexico to customers in Texas would have escaped tax under NMSA 1978, § 7-9-55, which provides a deduction for receipts from transactions in interstate commerce. *See also, Al Zuni Traders v. Bureau of Revenue*, 90 N.M. 258, 259-260, 561 P.2d 1351, 1352-1353 (Ct. App. 1977) (rejecting the taxpayer's Commerce Clause argument and noting that a deduction from gross receipts tax was allowed for all of the taxpayer's sales delivered out of state).

As this analysis demonstrates, the structure of New Mexico's gross receipts tax meets the internal consistency test. If every state taxed the sale of goods shipped into the state and exempted the sale of

goods shipped out of the state (except where the sale is completed prior to shipment), no more than 100 percent of a vendor's receipts would be subject to tax, regardless of the vendor's location. In Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflection on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 173-174 (1998), Professor Hellerstein notes that the United States Supreme Court has consistently approved this method of taxing interstate sales:

> First, with respect to gross receipts taxes on interstate sales activity, the Court has analogized gross receipts taxes to retail sales and use taxes. Because retail sales and use taxes are consumer taxes which are separately stated, collected from purchasers, and imposed on a transaction-by-transaction basis, apportionment of such levies—in the sense of division of the tax base—has never been viewed as a practicable solution to the multiple taxation issues that such taxes raise. Instead, the Court in effect has had to decide whether the state from which the goods were sent, the state to which the goods were shipped, or both, or neither would be permitted to tax retail interstate sales. In fact, the Court has generally allowed the state of destination to tax retail sales transactions while forbidding the state of origin from doing so. By analogy, the Court has generally sustained gross receipts taxes on interstate sales activity when imposed by the state to which the goods were shipped while prohibiting such taxes when imposed by the state from which the goods were sent. (footnotes omitted).

Finally, it should be noted that the Supreme Court has held that the mere possibility of multiple taxation is not sufficient to defeat a state tax. In *Goldberg*, *supra*, the Court held that a State in which an interstate telephone call originates or terminates has the requisite Commerce Clause nexus to tax a customer's purchase of that call. Although the Court acknowledged the possibility that more than one state could impose such a tax, it determined that this was not sufficient to invalidate the tax imposed by the State of Illinois:

> We recognize that, if the service address and billing location of a taxpayer are in different States, some interstate telephone calls could be subject to multiple taxation. n13 This limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme. *See Container Corp.*, 463 U.S., at 171; *Moorman*, 437 U.S., at 272-273. To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation. *D. H. Holmes*, *supra*, at 31 ("The . . . taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States"); *see also Tyler Pipe*, *supra*, at 245, n. 13.

Id., 488 U.S. at 263-264. *See also*, *Proficient Food*, *supra*, 107 N.M. 392, 395, 758 P.2d 806, 809 (rejecting taxpayer's theoretical argument that it could be subject to tax by Texas and California as well as by New Mexico); *Mossberg-Hubbard*, *supra*, 432 A.2d 1176, 1180 (finding that imposition of Rhode Island sales tax did not violate the Commerce Clause absent a showing that the taxpayer was actually subject

to multiple taxation on its interstate business). In this case, the exemption from tax provided by both Texas and New Mexico on sales consummated by the transfer of goods outside the state prevents any danger of multiple taxation and provides the internal consistency required by the *Complete Auto* test.

(2) External Consistency. New Mexico's gross receipts tax scheme also meets the requirement for external consistency. In this case, DCSLP has not completed its bargain with its customer and has not earned the receipts subject to tax until the goods being sold are physically delivered to the customer in New Mexico. Taxing DCSLP's receipts at the place where the sale is consummated reflects the economic reality of this transaction. As the United States Supreme Court explained in *Jefferson Lines, supra*, 514 U.S. at 186:

> A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale. . . . We have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future. *See, e.g., McGoldrick v. Berwind-White Coal Mining Co., supra.*

B. Discrimination. NMSA 1978 § 7-9-4 imposes an excise tax of five percent of a vendor's gross receipts from selling property in this state, regardless of the location of the vendor. DCSLP pays gross receipts tax on its sale of computers to New Mexico customers at exactly the same rate paid by in-state vendors of computers. *See also, Proficient Food, supra,*

107 N.M. 392, 396, 758 P.2d 806, 810 (gross receipts tax applies equally to in-state and out-of-state sellers). New Mexico's gross receipts tax does not discriminate against interstate commerce.

C. Relation to Services Provided. The fourth prong of the *Complete Auto* test asks whether the state tax is fairly related to the presence and activities of the taxpayer within the state and "focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue." *Goldberg*, *supra*, 488 U.S. at 267. In reviewing state transaction taxes, the Supreme Court has held that the benefits of fire and police protection, the use of public roads and utilities, and the other advantages of a civilized society are sufficient to justify the imposition of tax. *See*, *e.g.*, *Goldberg*, 488 U.S. 252, 267; *Jefferson Lines*, 514 U.S. 175, 200; *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 32 (1988). Similar benefits were extended to DCSLP in this case. Without fire and police protection, as well as public roads by which to effect delivery to its customers, DCSLP would have had no way to carry out its sales activity. Without electricity, telephone lines, and the other benefits of modern society, DCSLP would have had absolutely no market for its computers within New Mexico. For this reason, the fourth prong of the *Complete Auto* test is met.

D. Substantial Nexus. The final question to be determined is whether DCSLP has sufficient nexus with New Mexico to support New Mexico's imposition of gross receipts tax. Under the analysis in *Complete Auto*, a state must demonstrate that the tax at issue "is applied to an activity with a substantial nexus with the taxing State." 430 U.S. at 279. In the later case of *Quill Corporation v. North Dakota*, 504 U.S.

298 (1992), the United States Supreme Court held that for purposes of imposing sales and use taxes, the Commerce Clause requires that the taxpayer have a physical presence in the taxing state. Since *Quill*, states have struggled, with varying results, to define the parameters of the physical presence overlay to the substantial nexus requirement set out in *Complete Auto*.

Some guidance is provided by the Supreme Court's decisions in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), which upheld a finding of nexus based on the taxpayer's maintenance of two in-state offices unconnected with the sales transactions at issue, and *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987) and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1992), which upheld a finding of nexus based on the presence of independent representatives of the taxpayer within the taxing state. Although these decisions predated *Quill*, the Court reconfirmed their holdings, finding that the taxpayer operating through independent contractors in *Tyler Pipe* "had a physical presence in the taxing State," *Quill*, 504 U.S. at 314, and citing *National Geographic* and *Scripto* for the proposition that nexus "may turn on the presence in the taxing State of a small sales force, plant, or office." *Quill*, 504 U.S. at 315.

In this case, the Department maintains that the in-home repair services BancTec USA, Inc. ("BancTec") performed in New Mexico established DCSLP's physical presence in the state under *Scripto* and *Tyler Pipe* because DCSLP exercised a substantial degree of control over BancTec's activities and those activities served to further the market for DCSLP's products in New Mexico. The Department argues

that a physical presence also exists as a result of Dell Products L.P.'s ownership of replacement parts, mailing boxes and technical manuals provided to BancTec service technicians operating in New Mexico. Finally, the Department asserts that DCSLP engaged in "joint solicitation activities" with Dell Financial Services, L.P., an affiliated company which leased Dell computers to New Mexico customers. DCSLP rejects all of these arguments, maintaining that it did not have sufficient contacts with New Mexico to meet the physical presence requirement established in *Quill*.

(1) DCSLP's Relationship With BancTec. The parties have stipulated that DCSLP did not own or lease any real property, did not maintain any office or other place of business, did not operate any retail stores, and did not have any employees or independent sales agents located in New Mexico during the audit period. The issue to be decided is whether the repair services BancTec performed in New Mexico under the terms of three Service Contract Sales Brokerage Agreements ("Brokerage Agreements") gave DCSLP a physical presence in the state for purposes of New Mexico gross receipts tax.

Each of the Brokerage Agreements was entered into between BancTec and a different Dell entity: the 1991 agreement was with Dell USA Corporation, the 1995 agreement was with Dell Products L.P., and the 1998 agreement was with Dell USA L.P. The references to "Dell" in the agreements are generic, however, and are not limited to the contracting entity. For example, the 1995 Brokerage Agreement provides that "Dell shall render sales and marketing assistance to BancTec for the sale of Service Contracts." Stip. Ex. S-2 at 1. Dell Products L.P.—

the contracting entity—was the limited partnership responsible for manufacturing Dell products and did not engage in sales activity. Sales and marketing were handled by Dell Marketing L.P. (large corporate, governmental and institutional customers), Dell Direct Sales L.P. (small and medium-sized business customers) and DCSLP (individual home consumers). With regard to the transactions at issue in this case, DCSLP was the Dell entity responsible for marketing, selling, and overseeing BancTec service contracts sold to DSCLP customers under the terms of the Brokerage Agreements.

It is DCSLP's position that BancTec was an unrelated company doing business on its own behalf and not on behalf of DCSLP. While there is no question that BancTec performed computer repair services and received payment on its own behalf, that is true of any independent contractor and does not preclude a finding that BancTec was also performing those services at the direction and for the benefit of DCSLP. As set out in some detail in the Findings of Fact, *supra*, the parties' Brokerage Agreements strictly regulated the sale and the manner of execution of BancTec's service contracts with DCSLP customers. A brief review recap of just some of those facts illustrates the degree of control exercised by DCSLP:

— A New Mexico customer who wished to purchase a service contract for a Dell computer could not call BancTec directly, but had to purchase the contract through DCSLP.

— The service contracts between BancTec and DCSLP customers had to follow the form set out in the Brokerage Agreements. DCSLP had the right to

revise the contract from time to time "to facilitate ease of understanding by Customer."

— DCSLP set the price for BancTec service contracts. As a marketing tool, DCSLP often "bundled" the cost of BancTec's service contract into a single package price charged for a complete computer setup, including such components as the monitor, processor and hard drive.

— During the audit period, 75 percent of DCSLP's New Mexico customers purchased a service contract. BancTec was required to accept all service contracts sold by DCSLP.

— When a New Mexico customer who had purchased a BancTec service contract had a problem, the customer could not contact BancTec directly. Instead, the customer was required to call Dell Customer Technical Support ("Dell Tech Support"), which provided technical services to DCSLP for a fee.

— Only after Dell Tech Support had diagnosed the problem and determined that it could not be corrected over the telephone would it authorize BancTec to dispatch a technician to the New Mexico customer's address for service.

— During the audit period, Dell Tech Support dispatched BancTec technicians on 1,273 service calls and installation visits to DCSLP's customers in New Mexico.

— BancTec was required to follow detailed "Service Call Procedures" when performing services for DCSLP's New Mexico customers, which included a requirement that BancTec contact DCSLP customers within a specified period of time after receipt of a dispatch notice from Dell Tech Support.

— BancTec was required to track every service call against targeted arrival times and to cooperate with DCSLP "to establish and implement effective escalation or remedial procedures to produce optimum customer satisfaction."

— At the time of dispatch, Dell Tech Support delivered the parts required for resolution of the customer's problem to BancTec. BancTec was prohibited from using parts other than the parts supplied by Dell Tech Support. If the technician ran into a problem at the customer's site in New Mexico, he was required to call Dell Tech Support for additional assistance.

— BancTec's service technicians had to meet specific skill levels set out in the Brokerage Agreements and were trained to "professionally and positively" represent "Dell Computer Corporation and other partners" during on-site service calls.

— BancTec warranted its repair services to DCSLP, but disclaimed all warranties in its contracts with DCSLP customers.

— In the event a New Mexico customer was not satisfied with the services performed by BancTec, the customer registered a complaint with Dell Tech Support and not with BancTec. Dell Tech Support then acted as an intermediary, reporting the problem to BancTec management for resolution.

— If BancTec's "service level performance" as set out in the Brokerage Agreement fell below 95% for two consecutive months, DCSLP had the exclusive right to take over the service obligations under all of BancTec's existing service contracts with DCSLP's New Mexico customers, or to assign BancTec's service obligations to a third party chosen by DCSLP.

The record in this case provides overwhelming evidence that DCSLP controlled and directed BancTec's performance of repair services for DCSLP customers. DCSLP's characterization of BancTec as an independent service provider acting solely on its own behalf simply does not correspond to the facts. In carrying out the terms of its service contracts with DCSLP's New Mexico customers, BancTec was also carrying out the terms of its Brokerage Agreements with Dell, and its activities were performed on behalf of and for the benefit of both parties. Nonetheless, DCSLP argues that BancTec's activities in New Mexico cannot be attributed to DCSLP because (a) BancTec did not solicit sales on DCSLP's behalf, and (b) BancTec did not meet the legal definition of an agent under New Mexico law.

(a) Solicitation of Sales. DCSLP maintains that an independent contractor's in-state activities may be attributed to an out-of-state vendor only when the contractor is soliciting sales on behalf of the vendor. As support for its argument, DCSLP points out that the independent contractors in both *Scripto* and *Tyler Pipe* were involved in soliciting sales. Nothing in those decisions indicates, however, that the Supreme Court intended to limit its nexus analysis to identical fact situations. To the contrary, the Court concluded that the "crucial factor" governing a determination of nexus is "whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Tyler Pipe*, *supra*, 483 U.S. at 251 (quoting from the decision of the Washington Supreme Court). There is nothing to suggest that

the only activity that can meet this criteria is the solicitation of sales.

In December 1995, the Multistate Tax Commission ("MTC") issued Nexus Program Bulletin 95-1, which concludes that an out-of-state computer company providing in-state repair services to its customers through a third-party contractor has nexus with the state.[4] Ex. A at B12.3. Although the fact scenario used in the bulletin refers to services performed under a warranty, the MTC notes that this example "is for illustrative purposes and should not be interpreted to exclude other instances involving similar, but not identical, fact patterns." *Id.* *See also*, Richard D. Pomp & Michael J. McIntyre, *State Taxation of Mail-Order Sales of Computers After Quill; An Evaluation of MTC Bulletin 95-1*, 11 State Tax Notes 177 (1996) (describing the bulletin as a refinement of the MTC's long-standing conviction that a mail-order seller has nexus with a state if it has an in-state service representative who regularly acts on its behalf). Bulletin 95-1 takes the position that representatives other than salesmen may establish nexus for out-of-state vendors and lists 26 states, including New Mexico, that "have indicated that their law is consistent with the constitutional and federal statutory nexus principles described in this Bulletin." Ex. A at B12.5. *See also*, *Borders Online LLC v. State Board of Equalization*, 29 Cal. Rptr.3d 176, 190 (Cal. App.

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[4] The MTC is "the organization primarily responsible for promoting uniformity of taxation in member states." *Kmart Properties, Inc. v. Taxation & Revenue Department*, 2006-NMCA-26, ¶ 52, quoting from *Twentieth Century-Fox Film Corp. v. Department of Revenue*, 700 P.2d 1035, 1041 (Or. 1985). The MTC was established through the Multistate Tax Compact, which was adopted by New Mexico in 1967. NMSA 1978, § 7-5-1.

2005) (there is no requirement that an out-of-state retailer's in-state representative be engaged in the solicitation of sales to satisfy the substantial nexus required by the Commerce Clause).

In *Kmart Properties, Inc. v. Taxation & Revenue Department*, 2006-NMCA-26 (Ct. App. 2001), *reversed in part on other grounds, Kmart Corporation v. Taxation and Revenue Department*, 2006-NMSC-006, the New Mexico Court of Appeals determined that the in-state activities of Kmart employees, which served to protect and promote the trademarks of Kmart's out-of-state subsidiary, were sufficient to establish the subsidiary's nexus with New Mexico for gross receipts tax purposes. While noting that the subsidiary was not engaged in retail sales, the court concluded that this did not change the Commerce Clause analysis to be applied in determining nexus:

> Unlike *Tyler Pipe* and *Scripto*, KPI is not engaged in the retail sales of a product. Its sole function is to hold title to marks and associated goodwill that are under license to Kmart Corporation. The question is whether this distinction, with respect to the kind of business and the nature of the intangible property interests being promoted, requires any different result. We think not.

Id., 2006-NMCA-26, ¶ 34.

Louisiana courts have also rejected the argument that solicitation of sales is the only type of third-party activity that can create nexus for an out-of-state vendor. In *Louisiana Department of Revenue and Taxation v. Quantex Microsystems, Inc.*, 809 So. 2d 246 (La. Ct. App. 2001), the Louisiana Court of Appeals concluded that an out-of-state corporation's use of independent contractors to provide on-site computer repair services in Louisiana could establish

substantial nexus under *Quill*. The court of appeals reversed the trial court's grant of summary judgment and remanded the case for further development of the facts, including the extent of the on-site repair services performed by the contractor and whether those services were significantly associated with Quantex's ability to establish and maintain a market in Louisiana.

The holding in *Quantex* was reconfirmed in *Louisiana Department of Revenue and Taxation v. Dell International, Inc.*, 922 So.2d 1257, 2006 La. App. LEXIS 280 (La. Ct. App. 2006), *rehearing denied*, 2006 La. App. LEXIS 867 (March 30, 2006), which presented issues identical to the issues in this case. Once again, the court reversed the trial court's grant of summary judgment, finding that the trial court erred in concluding that BancTec's computer repair services for Dell customers located in Louisiana could not provide Dell with the substantial nexus required for state taxation:

> Both the extent and the nature of the services provided by BancTec to Dell's Louisiana customers as well as the impact of this service on Dell's ability to establish and maintain a lucrative market in this state are clearly presented as evidence in this record. Applying the well-settled law to the facts of this case, we can not conclude that Dell established an absence of factual support for the claim by LDL that BancTec provided computer repair services in Louisiana to Dell customers on behalf of Dell and thus, that Dell's activities in this state constituted a sufficient nexus to create the physical presence constitutionally required for the imposition of a use tax

> herein. Thus, Dell failed to establish its entitlement to judgment in its favor as a matter of law.

Id., 2006 La. App. LEXIS 280, 24-25.

As the above cases demonstrate, in-state representatives may establish nexus for an out-of-state vendor through activities other than sales. The "crucial factor" is not the nature of the in-state activities, but whether those activities are "significantly associated with the taxpayer's ability to establish and maintain a market" for sales. *Tyler Pipe*, *supra*, 483 U.S. at 251.

(b) Agency. DCSLP also argues that BancTec's activities in New Mexico are "immaterial for purposes of establishing nexus" because BancTec did not have the legal authority to bind DCSLP and was not an "agent" as defined in New Mexico law. Post-Hearing Brief at 16-17. This argument ignores the United States Supreme Court's decisions in both *Tyler Pipe* and *Scripto*, which concluded that a formal agency relationship is not required in order for the activities of an in-state representative to establish nexus for an out-of-state vendor. In *Tyler Pipe*, *supra*, 483 U.S. at 250, the Court found that:

> As a matter of law, the Washington Supreme Court concluded that this showing of a sufficient nexus could not be defeated by the argument that the taxpayer's representative was properly characterized as an independent contractor *instead of as an agent*. We agree with this analysis. (emphasis added).

In *Scripto*, the Supreme Court upheld a finding of nexus despite the fact that the out-of-state vendor did not have "any regular employee *or agent*" in the state. *Id.*, 362 U.S. at 209 (emphasis added). The

ten wholesalers operating in Florida solicited orders for Scripto's products, which were then forwarded to Georgia for acceptance or refusal. The wholesalers themselves had no authority to accept or reject orders, to accept payments, or to incur debts on behalf of the vendor. The Supreme Court nonetheless held that the wholesalers' activities established a sufficient nexus between the vendor and the State of Florida to subject to the vendor to tax:

> True, the "salesmen" are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as "independent" neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida. . . . To permit such formal "contractual shifts" to make a constitutional difference would open the gates to a stampede of tax avoidance.

Id., 362 U.S. at 211. State courts have also held that the activities of independent contractors who do not meet the legal definition of an "agent" may be sufficient to subject an out-of-state vendor to state tax. *See, Commissioner of Revenue v. Jafra Cosmetics, Inc.*, 742 N.E.2d 54, 59 (Mass. 2001) (an out-of-state vendor was subject to sales and use tax based on activities of in-state consultants without power to bind the vendor: "the lack of contractual authority was legally insignificant"); *Amway Corp., Inc. v. Director of Revenue*, 794 S.W.2d 666, 671 (Mo. 1990) (independent distributors were acting "on behalf" of Amway even though they lacked legal authority to enter into contracts); *Ex parte Newbern*, 239 So.2d

792, 796-798 (Ala. 1970), *appeal dismissed*, 409 U.S. 813 (1972) (in-state salesmen need not have a legal relationship with an out-of-state vendor in order to subject the vendor to tax).

The only authority DCSLP cites in support of its argument that a formal agency relationship is required for a finding of nexus is the Connecticut Superior Court's decision in *Dell Catalog Sales, L.P. v. Commissioner of Revenue Services*, 834 A.2d 812 (Conn. Super. Ct. 2003), which considered the same issues raised in this protest. There, the court noted that "*[a]lthough it appears that BancTec was operating in Connecticut on Dell's behalf*," the state tax commissioner had stipulated that Dell had no right to direct and control the work of BancTec and that BancTec was not an agent for Dell. *Id.*, 834 A.2d at 819 (emphasis added). Contrary to DCSLP's assertions, however, the absence of an agency relationship was not the basis for the Connecticut court's holding that BancTec's activities did not establish nexus for DCSLP. Even after determining that the tax commissioner's stipulations negated a finding of agency, the court went on to find as follows:

> One cannot escape the fact, however, that BancTec served an important need of Dell Catalog Sales to service the Dell customers in Connecticut. Dell Catalog Sales benefitted financially from the sales of the service contracts as well as the ability to have an outsourced repair service attend to the needs of its customers in Connecticut. *See* 2 R. Pomp & O. Oldman, *supra*, p. 9-63. The missing ingredient in determining whether BancTec's on-site service established nexus in Connecticut as a representative of Dell would be

> the frequency, if any, of the number of on-site service calls.
>
> . . . For the most part, the facts in the present case were developed by a stipulation of the parties. The stipulation of facts contains no information regarding the extent of BancTec's activities in Connecticut. . . .

Id., 834 A.2d at 822. The court concluded that because there were "no facts to support the commissioner's claim that BancTec had sufficient, substantive physical presence in the state of Connecticut, the plaintiffs appeal must be sustained." *Id.*, 834 A.2d at 823.

In contrast to the Connecticut case, the Department in this case has not stipulated that DCSLP lacked the right to direct and control the work of BancTec, and the facts presented at the administrative hearing support exactly the opposite conclusion. Under the terms of the three Brokerage Agreements, DCSLP exercised extensive control over BancTec's service activities in New Mexico. DCSLP determined whether BancTec would be permitted to make an on-site service call; the time frame within which BancTec was required to respond to DCSLP's dispatch notices; the training and skill level of each BancTec technician assigned to a particular type of service call; and the extent of the service provided to the customer, including the specific parts to be replaced. The record also establishes that BancTec had a substantial presence in New Mexico during the audit period, making more than 1,200 service calls on DCSLP customers within the state.

In *Dell International*, *supra*, the Louisiana Court of Appeals relied on these same facts to reject the trial court's conclusion that BancTec's status as an inde-

pendent contractor precluded a finding that BancTec was performing repair services on behalf of Dell:

> Our *de novo* review of this matter reveals that the trial court erred as a matter of law in concluding based on those facts no issue of material fact existed that BancTec was not acting on behalf of Dell. On appeal, Dell maintains the trial court was correct in finding BancTec was not its contractual "agent," rather it was a "broker" and therefore, was not acting "on its behalf." Dell argues semantics, rather than law, and as noted by the Court in *Scripto*, these are fine distinctions without constitutional significance. Moreover, the trial court and Dell both ignore the Supreme Court's admonition in *Scripto*, that the "contractual tagging" of a third party as an independent contractor or salesman is simply insufficient to change the function of the third party "nor bears on its effectiveness in securing a substantial flow of goods into [the state]." 362 U.S. at 211. The nature and extent of the activities (*Scripto*, 362 U.S. at 211) and whether those activities are significantly associated with the taxpayer's ability to establish and maintain a market in this state (*Tyler Pipe Industries, Inc.*, 483 U.S. at p. 250; *Quantex*, 809 So.2d 252) are the determinative factors of whether Dell's contractual dealings with BancTec constitute a sufficient physical nexus for the purpose of justifying the imposition of a use tax.

Dell International, Inc., supra, 922 So.2d 1257, 2006 La. App. LEXIS 280, 18-19.

Based on the facts presented in this protest, BancTec was acting at DCSLP's direction and on its behalf in performing services under the contracts

DCSLP sold to its customers in New Mexico. The question that remains is whether BancTec's activities were significantly associated with DCSLP's ability to establish and maintain a market for its computer products. A review of the facts presented at the administrative hearing show that they were.

Richard Salwen, former legal counsel for Dell Computer Corporation, explained the genesis of Dell's decision to seek out a company to provide repair services to Dell customers:

> Well, as Dell was growing, and this was really in the 1985, '86, '87 time frame . . . we started having customers, and many of them were small business customers, who said, well, if my computer breaks, I don't want to have to send it back to the factory and I don't have the expertise to go inside the box and I don't really want or need the hassle of going and finding the computer geek service organization here in my town that will come and fix my computer for me. So I need something different. Dell, can't you provide me some service?

Tr. 87. Initially, Dell entered into an agreement with Honeywell Bull "as the partner for a service alliance to provide—to have Honeywell Bull provide repair service to the owners of Dell computers." Tr. 90. That relationship ended when Dell began receiving complaints from customers. As Mr. Salwen explained: "Dell computer owners didn't like who was providing them their service and they were calling Dell and blaming us because we had sold the contracts to them." Tr. 92. Xerox was subsequently selected by Dell to provide repair service to its customers. Tr. 94. That relationship ended when Xerox wanted more money on each of the service contracts sold by Dell.

Dell declined to increase the price because a higher price would result in fewer sales of service contracts "and people are going to be unhappy again and the whole reason that we were interested in doing this in the first place was because it was what our customers wanted. Certainly we make money at it and we want to, but we want first of all to make sure that customers are served properly." Tr. 97. After the agreement with Xerox expired, Dell entered into the Brokerage Agreements with BancTec, under which BancTec acted as the exclusive provider of on-site repair services for Dell computer products.

Brian Wood, who is a vice president of Dell Marketing L.P., testified concerning the interplay between the manufacturer's warranty provided on Dell products and the BancTec service contract:

> [W]hen a consumer buys a service contract, what they're essentially buying is a contract with BancTec that allows them to have an alternative vehicle to get a warranty claim dealt with. In the standard warranty model and there is no service contract in place, if you have a problem, you have to send it back to us, we'll repair it, and we'll send it back to you. . . . All the BancTec contract is a way to say, I don't really want to do that because that's hard and it's expensive, and BancTec will say, we'll handle that for you.

Tr. 164-165. Mr. Wood explained that if a customer whose computer was still under warranty had a BancTec service contract, then "BancTec would handle that warranty repair for them and they would do it on site so no need to box the computer and send it back to us. BancTec would get the spare part, effect the repair, and return the part." Tr. 169. Mr. Wood acknowledged that the availability of in-home

service was an important factor in establishing Dell's market for sales. Tr. 165.

Based on the testimony of Mr. Salwen and Mr. Wood, there is no question that the in-home repair services provided by BancTec significantly enhanced DCSLP's ability to establish and maintain its market for Dell computers in New Mexico and elsewhere. For many customers, the prospect of having to pack up and mail a Dell computer back to Texas—at the customer's expense—and then wait for its return, was simply not acceptable. In order to make Dell computers attractive to potential customers, DCSLP had to provide those customers with a convenient method to have their Dell computers repaired on site. This is confirmed by the fact that approximately 75 percent of DCSLP's customers purchased a service contract for their Dell computers.

In light of Dell's negative experience with Honeywell Bull, it was also important to insure that the quality of the service provided to DCSLP customers met certain standards. For this reason, the Brokerage Agreements gave DCSLP a significant amount of control over the manner in which BancTec carried out its service obligations to DCSLP customers. While this control and attention to detail made good business sense and resulted in an enhanced market for Dell computers, it also resulted in DCSLP's loss of the constitutional protections afforded to retailers "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." *Quill, supra*, 504 U.S. at 315, quoting from *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967). Once an out-of-state retailer ventures beyond this safe harbor, whether through the activities of its own employees or through

the activities of independent contractors acting on its behalf, the retailer has the same obligation for payment of sales and use taxes as do retailers operating within the state. In this case, DCSLP's relationship with BancTec, which provided in-home repair services to DCSLP's New Mexico customers, was sufficient to meet the physical presence requirement under *Scripto* and *Tyler Pipe* and to subject DCSLP to New Mexico gross receipts tax on its sales to New Mexico customers.

(2) Alternative Nexus Theories. The Department raises two alternative nexus arguments based on its contention that DCSLP and Dell Financial Services L.P. ("Dell Financial") engaged in "joint solicitation activities" in New Mexico and that Dell Products L.P. ("Dell Products") owned mailing boxes, replacement parts and technical manuals in the state.

In *Quill*, *supra*, 504 U.S. at 315, the United States Supreme Court confirmed that nexus "may turn on the presence in the taxing State of a small sales force, plant, or office." One of the cases cited for this proposition was *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), which held that the presence of two corporate offices was sufficient to establish National Geographic's nexus with California, even though the activities performed by those offices were unrelated to the sales transactions California sought to tax. As a result of the holding in *National Geographic* and similar cases, many businesses have adopted a practice known as "entity isolation." This involves creating affiliated companies to operate different aspects of a unitary business that formerly would have operated as a single company. By dividing the business into separate legal entities, it is possible to avoid having the

physical presence of one entity operating within a state attributed to the activities of another entity operating outside the state.

Although the practice of entity isolation has engendered much discussion and some criticism, it has so far withstood the attempts of state tax authorities to extend the analysis employed in *National Geographic* to allow a finding of nexus based solely on the presence of an affiliated entity within the state.[5] Instead, courts have applied the same analysis used to determine whether the presence of an unrelated third party can be attributed to an out-of-state vendor, *i.e.*, to what extent does the activity of the in-state affiliate further the interests of the entity the state is seeking to tax? *See, e.g., Borders Online LLC v. State Board of Equalization*, 29 Cal. Rptr.3d 176, 190 (Cal. App. 2005) (policy allowing customers to return goods ordered online to the brick-and-mortar stores of an in-state affiliate was significantly associated with the online retailer's ability to establish and maintain a market for sales in the state); *Reader's Digest Association, Inc. v. Mahin*, 255 N.E.2d 458 (Ill. 1970), *cert. denied*, 399 U.S. 919 (1970) (subsidiaries' active solicitation of sales in the state supported a finding of nexus for the parent corporation). *Cf., Current, Inc. v. California State Board of Equalization*, 29 Cal. Rptr.2d 407 (Cal. App. 1994) (in-state presence of an affiliated manufacturer and wholesaler of goods did not create nexus for an out-of-state mail order company with a different product line and customer

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[5] *See*, John A. Swain, *Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?*, 75 S.Cal. L. Rev. 419 (2002); Michael J. McIntyre, *Commentary on McLure and Hellerstein: Taxing Electronic Commerce Fairly and Efficiently*, 52 Tax. L. Rev. 625 (1997).

base); *SFA Folio Collections Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), *cert. denied*, 501 U.S. 1223 (1991) (in-state retailer and out-of-state mail order company linked by a common parent and sharing a corporate name and logo could not be treated as a single entity for purposes of establishing a nexus); *Bloomingdale's by Mail v. Department of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd*, 591 A.2d 1047 (Pa. 1991), *cert. denied*, 504 U.S. 955 (1992) (presence of in-state retailer did not create nexus for its out-of-state mail order subsidiary).

In this case, the Department's theory of affiliate nexus appears to resurrect the "common enterprise" theory rejected in *SFA Folio*, *supra*. The current state of the law of nexus, as well as New Mexico's history of honoring the distinction between separately incorporated entities, does not support the Department's position. *See*, *Scott v. AZL Resources, Inc.*, 107 N.M. 118, 753 P.2d 897 (1988) (only under special circumstances will the courts disregard a corporate entity to create liability for individual shareholders or a parent corporation); *Cruttenden v. Mantura*, 97 N.M. 432, 640 P.2d 932 (1982) (creditor could not garnish wages payable by a subsidiary to its employee by serving writ of garnishment on the parent corporation). There is no question that the Dell limited partnerships cooperated with each other in carrying out their day-to-day business and, in some cases, performed procurement and other services for one another. The evidence does not establish, however, that the operation of the separate partnerships was so intertwined that they constituted sham entities. In order to establish its theory of affiliate nexus, therefore, the Department must show that the in-state activity of a particular Dell

limited partnership was significantly associated with DCSLP's ability to market and sell computers to customers located in New Mexico.

(a) Leasing Computers in New Mexico. The Department contends that Dell Financial had nexus with New Mexico and that this nexus can be attributed to DCSLP. Post-Hearing Response Brief at 15-16. The Department bases its argument on the fact that Dell Financial purchased advertising space in DCSLP's catalogs and DCSLP informed its customers that they could lease—rather than buy—a Dell computer. There are several problems with the Department's reasoning. First, Dell Financial did not begin leasing computers until April 1997—no lease option was offered to DCSLP customers during the first four years of the audit period. Second, there is no evidence that any computers were leased to customers located in New Mexico during the remaining two years of the audit period. Finally, the Department's assertion that DCSLP and Dell Financial were "engaged in a joint venture to further the overall sales of the entity which owns and controls both of their activities, Dell Computer Corporation," is irrelevant to DCSLP's gross receipts tax liability. Post-Hearing Response Brief at 16-17. The matter at issue is whether Dell Financial was engaged in activities in New Mexico that were significantly associated with DCSLP's ability to establish and maintain a market for sales in New Mexico, not whether the activities of the two Dell affiliates furthered the "overall sales" of their parent corporation. The evidence does not support the Department's arguments concerning Dell Financial's activities in New Mexico or its relationship with DCSLP.

(b) Presence of Mailing Boxes in New Mexico. When a DCSLP customer had a problem with a defective computer part, Dell Products mailed a replacement part to the customer in a box that could be re-used to return the original part to the factory as required by Dell Products' warranty. Despite the Department's arguments to the contrary, the fact that Dell Products included a prepaid return shipping label in boxes used to mail replacement parts does not establish that Dell Products "owned" the mailing boxes after their receipt by DCSLP's customers. Under the terms of the warranty, customers "must ship the products back to Dell in their original *or equivalent* packaging. . . ." Ex. F, last tab (emphasis added). Clearly, customers were free to throw the original mailing boxes away or use them for another purpose and substitute their own boxes to ship defective parts back to the factory. While it may have been convenient to do so, nothing in the record suggests that New Mexico customers were required to use Dell Products' packaging material or that Dell Products retained ownership of this material.

(c) Presence of Technical Manuals in New Mexico. The Department also failed to establish that Dell Products (or any other Dell entity) owned technical manuals located in New Mexico. DCSLP acknowledged that training manuals were provided to BancTec in Texas. There is no evidence, however, that those manuals were ever present in New Mexico. The audit report states that the auditor was unable to determine whether BancTec's service technicians "carry any type of Dell manuals." Ex. A at GNN1.6. The fact that the auditor ultimately concluded "that Dell may have had training materials and technical manuals in the state" (Post-Hearing

Response Brief at 15) carries little weight without some evidentiary basis for that conclusion. Even if technical manuals for Dell computers were present in New Mexico, it is far from clear that the manuals belonged to Dell. The section titled "Service Materials" in the Brokerage Agreements states that "Dell will own all copyright and other rights to documentation prepared by Dell." Stip. Ex. S-2 at 33. Owning a copyright is not equivalent to owning every technical manual or other document produced under the copyright.

(d) Presence of Computer Parts in New Mexico. There is evidence that Dell Products retained ownership of computer parts removed from Dell computers located in New Mexico. The terms and conditions governing DCSLP's sales to New Mexico customers stated that "Dell owns all parts removed from repaired products" and required customers to "pay Dell for replacement parts when the replaced part is not returned to Dell. . . ." Stip. Ex. S-5, second page. *See also*, Ex. F, last tab. With regard to the replacement parts that Dell Products provided to BancTec, the Brokerage Agreements state that title and possession transferred to BancTec in Texas. In reality, BancTec never acquired true ownership of these parts. BancTec was prohibited from using the replacement parts for any purpose other than servicing the computers of Dell customers and could not "repair, scrap or sell any faulty System parts or any spare parts acquired from Dell to any party other than Dell or Customers." Stip. Ex. S-2 at 29. As Michael Burns, BancTec's former vice president, described the situation, BancTec was merely a bailee of spare parts and was liable to Dell for any loss or damage to those parts while they were in BancTec's possession. Tr. 213-215.

As discussed under Issue II.D(1), *supra*, the BancTec service contracts DCSLP sold to its customers significantly enhanced DCSLP's ability to establish and maintain its market for Dell computers in New Mexico and elsewhere. Dell Products' ownership and control of replacement parts was an important factor in BancTec's ability to provide service under the contracts. As Dell vice president Brian Wood testified, BancTec provided an "alternative vehicle to get a warranty claim dealt with." Tr. 164. If a customer whose computer was still under Dell Products' warranty had a BancTec service contract, then "BancTec would handle that warranty repair for them and they would do it on site. . . . *BancTec would get the spare part, effect the repair, and return the part.*" Tr. 169 (emphasis added). This procedure confirms that, at least for parts under warranty, BancTec was not buying replacement parts from Dell Products and reselling them to DCSLP customers. Dell Products was required to provide those parts to the customer free of charge. BancTec merely served as the delivery agent, shipping the part from Texas into New Mexico and installing it in the customer's computer pursuant to instructions BancTec received from DCSLP through Dell Tech Support. BancTec then took possession of the defective part, which was the property of Dell Products under the terms of its warranty, and delivered the part to Dell's facility in Texas.

Dell Products played an integral role in DCSLP's efforts to provide its customers with a fast and convenient method of obtaining on-site repair of their Dell computers. By insuring that BancTec received the correct part to service DCSLP customers in a timely manner, Dell Products helped to insure customers' satisfaction with the service contract and

with their Dell computers. This, in turn, enhanced DCSLP's ability to establish and maintain its market for sales in New Mexico. Placed in this context, Dell Products' ownership and control of computer parts located in New Mexico is a contributing factor in establishing that DCSLP had nexus with New Mexico for purposes of the New Mexico gross receipts tax.

Issue III. Whether DCSLP is liable for compensating tax on catalogs mailed into New Mexico.

The Department assessed DCSLP for $31,908.69 of compensating tax for the period January 1993 through June 1997. The basis for the assessment was that DCSLP "used catalogs shipped into New Mexico to promote the sales of their computers." Ex. A at CN1.1. DCSLP challenges the assessment on the following grounds: DCSLP lacks constitutional nexus with New Mexico; DCSLP does not "use" the catalogs in New Mexico within the meaning of the compensating tax statutes; and the amount of tax is inflated because DCSLP did not begin mailing catalogs into New Mexico until June 1997, more than four years into the audit period. Post-Hearing Brief at 25.

A. Nexus. DCSLP first argues that it cannot be subject to tax in New Mexico because it does not have the physical presence required for a finding of substantial nexus under the Commerce Clause. This argument has already been addressed under Issue II.D(1), *supra*. DCSLP further argues that constitutional nexus does not exist for compensating tax purposes because DCSLP "does not control the production or distribution of the catalogs from within New Mexico." Post-Hearing Brief at 27. This same argument was rejected by the United States Supreme Court in *D. H. Holmes Co. v. McNamara*, 486 U.S. 24

(1988), which upheld Louisiana's imposition of use tax on mail order catalogs printed outside the state and mailed by the printer directly to prospective customers in Louisiana. In a unanimous decision, the Court rejected the taxpayer's argument that it did not "use" the catalogs in Louisiana because it did not control distribution of the catalogs within the state:

> Holmes' contention that it lacked sufficient control over the catalogs' distribution in Louisiana to be subject to the use tax verges on the nonsensical. Holmes ordered and paid for the catalogs and supplied the list of customers to whom the catalogs were sent; any catalogs that could not be delivered were returned to it. Holmes admits that it initiated the distribution to improve its sales and name recognition among Louisiana residents.

Id., 486 U.S. at 32. In this case, DCSLP operated as a direct catalog sales company and the distribution of catalogs to potential customers was essential to establishing and maintaining its market for sales in New Mexico and elsewhere. As the Court found in *D. H. Holmes*, *supra*, the fact that DCSLP contracted with a third party to produce and mail its catalogs does not support the conclusion that DCSLP had no control over distribution of those catalogs within New Mexico. DCSLP had nexus with New Mexico for purposes of the compensating tax.

B. Meaning of "Use" under New Mexico's Compensating Tax Statutes. NMSA 1978, § 7-9-7 imposes a compensating tax on "the privilege of using tangible property in New Mexico." The term "use" is defined to mean "use, consumption or storage other than storage for subsequent sale in the ordinary course of business or for use solely outside this

state." NMSA 1978, § 7-9-3.1(N). The issue to be decided is whether DCSLP's distribution of catalogs to potential customers in New Mexico was a taxable "use" of those catalogs. The only New Mexico case addressing the application of compensating tax to advertising materials is *Phillips Mercantile Co. v. Taxation and Revenue Department*, 109 N.M. 487, 786 P.2d 1221 (Ct. App. 1990). There, Phillips contracted with an out-of-state "coordinator" to produce catalogs and newspaper inserts. The coordinator then shipped these items to an Albuquerque mailing service, which addressed and mailed the catalogs to New Mexico residents, and to two New Mexico newspapers, which included the advertising inserts in newspapers distributed within the state. The court upheld the Department's assessment of compensating tax against Phillips on the value of the catalogs and inserts purchased from the out-of-state coordinator:

> Phillips contends it did not use the remaining catalogs or inserts because it never had physical possession of those printed materials. Phillips offers no New Mexico authority for the proposition that "use" requires actual physical possession and control of the property. Further, the cases Phillips relies on are distinguishable because in those cases, the in-state retailer had the advertising material shipped directly from the out-of-state seller or printer to the in-state recipient, and those materials were never in possession, in the taxing state, of a third party having a contractual relationship with the retailer. *See District of Columbia v. W. Bell & Co.*, 420 A.2d 1208 (D.C. App. 1980); *Bennett Bros., Inc. v. State Tax Comm'n*, 62 A.D.2d 614, 405 N.Y.S.2d

803 (1978); *Modern Merchandising, Inc. v. Department of Revenue*, 397 N.W.2d 470 (S.D. 1986).

Id., 109 N.M. at 488-489, 786 P.2d at 1222-1223. Although DCSLP cites *Phillips Mercantile* for the proposition that there can be no taxable use of DCSLP catalogs in the absence of an in-state distributor, the court of appeals never reached this issue. In addition, the cases cited in *Phillips Mercantile*—which are also cited in DCSLP's brief—were decided prior to the United States Supreme Court's decision in *D. H. Holmes, supra.* As noted in Hellerstein, *supra*, ¶ 16.03[3][a] at 16-20, *D. H. Holmes* called earlier state court decisions annulling taxes on promotional materials sent into the state "into serious question." As the authors explain:

> When the printer mailed the catalogs to residents of Louisiana from other states, it did so as agent for DH Holmes. That the printer or the U.S. mails, or a common carrier delivering catalogs, were independent contractors would not affect the result. They were agents of the taxpayer or its agent, the printer, whose acts were attributable to the retailer. Getting the catalogs and fliers into the hands of the prospective customers was the business reason the mail order house had them produced. Consequently, the delivery of the articles to the prospects in the taxing state by the taxpayer's agents should properly be treated as a "use" of the articles in the state by the taxpayer.

Id. at 16-21 to 16-22 (footnote omitted). The same conclusion was reached by the Connecticut Supreme Court in *Sharper Image Corp. v. Miller*, 692 A.2d 774, 779-780 (Conn. 1997):

> Even though the distribution was accomplished by having the catalogs placed in the hands of the postal service in Nebraska, the delivery was not at the discretion of the postal service. Rather, the delivery was directed by Sharper Image to specific residents in this state. Sharper Image contracted with Foote & Davies to print and label the catalogs based on a mailing list it provided to them, and Sharper Image also directed that they be delivered by the postal service. Simply put, the catalogs entered the state at the command and direction of Sharper Image. We see no distinction between this arrangement and one in which the employees of Sharper Image themselves deliver the catalogs door to door in Connecticut.

In *Sharper Image Corp. v. Arizona Department of Revenue*, 957 P.2d 1369, 1371-1372 (Ariz. Ct. App. 1998), the Arizona Court of Appeals also upheld the imposition of use tax on Sharper Image catalogs, reconfirming its decision in the earlier case of *Service Merchandise Co., Inc. v. Arizona Department of Revenue*, 937 P.2d 336 (Ariz. App. 1996):

> One cannot reasonably dispute the use-tax liability of a hypothetical taxpayer in the position of Service Merchandise or Sharper Image who has its own employees truck its advertising materials to Arizona and deliver them to Arizona addressees. As we intimated in *Service Merchandise*, no sensible rationale can be offered for holding that a taxpayer who does exactly the same thing through private or quasi-public independent contractors does not use its property in Arizona to precisely the same extent.

See also, Associated Petroleum Transport, Ltd. v. Shepard, 53 N.M. 52, 55, 201 P.2d 772, 774 (1949)

(plaintiffs having selected the United States mail as the means of delivering their protest, it became their agent).

Since the Supreme Court's decision in *D. H. Holmes*, virtually every state court that has addressed the issue has held that retailers are liable for use tax on catalogs and other promotional material mailed into the state. *Commissioner of Revenue v. J.C. Penney Co., Inc.*, 730 N.E.2d 266 (Mass. 2000); *J.C. Penney Co., Inc. v. Balka*, 577 N.W.2d 283 (Neb. 1998); *Sharper Image Corp. v. Arizona Department of Revenue, supra*; *Sharper Image Corp. v. Miller, supra*; *Sharper Image Corp. v. Department of Revenue of State of Florida*, 704 So.2d 657 (1st Dist. Ct. App. 1997), *review denied*, 722 So.2d 195 (1998), *cert. denied*, 526 U.S. 1016 (1999); *Service Merchandise Co., Inc. v. Schwartzberg*, 971 P.2d 654 (Colo. App. 1997); *American Express Travel Related Services Co., Inc. v. Tax Commission of State of Idaho*, 920 P.2d 921 (Idaho 1996); *Service Merchandise Co., Inc. v. Arizona Department of Revenue, supra*; *Talbots, Inc. v. Schwartzberg*, 928 P.2d 822 (Colo. App. 1996); *Collins v. J.C. Penney Co.*, 461 S.E.2d 582 (Ga. App. 1995); *Comfortably Yours, Inc. v. Director, Division of Taxation*, 640 A.2d 862 (N.J. Super, App. Div. 1994); *J.C. Penney Co., Inc. v. Olsen*, 796 S.W.2d 943 (Tenn. 1990).

The only case with a contrary result cited in DCSLP's brief is *Sharper Image Corp. v. Michigan Department of Treasury*, 550 N.W.2d 596 (Mich App. 1996), *app. denied*, 560 N.W.2d 636 (1997), where the court found that because the state statute did not define the term "use" to include the distribution of material, the use tax did not apply to the distribution of catalogs to Michigan residents. In New Mexico, the

legislature has not attempted to list every activity that will constitute a taxable "use" of property. It is clear, however, that the legislature intended the term to be interpreted broadly. NMSA 1978, § 7-9-8(A) provides a presumption of taxability and states that "it is presumed that property bought or sold by any person *for delivery into this state* is bought or sold for a taxable use in this state." (emphasis added). This presumption, and the overwhelming weight of authority from other jurisdictions, supports the conclusion that DCSLP is liable for compensating tax on the value of catalogs distributed in New Mexico.

C. Factual Basis for Assessment. The Department's assessment of compensating tax covers the entire six-year audit period. DCSLP contends that the tax is overstated because DCSLP did not begin mailing catalogs into New Mexico until July 1997. Emily Parrino, senior state tax manager for Dell USA L.P., testified that she recalled the date because "[w]e moved into a new building in January of 1996 and I remember that it was shortly after that that they started sending catalogs outs. They started developing a catalog and it was around the middle of 1997 that they actually started mailing catalogs." Tr. 300. Ms. Parrino also testified that she checked with Dell USA L.P.'s procurement division and the only contract in its records concerning DCSLP catalogs was an Advertising Agency Master Services Agreement dated July 29, 1997. Tr. 301. Although the contract was entered into between Rapp Collins Worldwide and Dell Products L.P., the opening paragraph states that Dell Computer Corporation –"and any of its corporate subsidiaries or affiliates may purchase Services . . . and enjoy the benefits of this Agreement." Exhibit 17. The attached schedule of deliverables

makes specific reference to "DCS" catalogs to be ready by "drop dates" beginning in July 7, 1997. Ms. Parrino testified that her job duties included reviewing catalogs and that the first catalogs she saw for DCSLP were in the time frame of June or July of 1997. Tr. 304.

Although the Department's assessment of tax has a statutory presumption of correctness, that presumption is overcome when the taxpayer comes forward "with some countervailing evidence tending to dispute the factual correctness of the assessment. . . ." Regulation 3.1.6.12(A) NMAC; *MPC Ltd. v. New Mexico Taxation & Revenue Department*, 2003-NMCA-21, ¶ 13, 133 N.M. 217, 62 P.3d 308. Once the presumption is rebutted, the burden shifts to the Department to establish the basis for its assessment. *New Mexico Taxation & Revenue Department v. Whitener*, 117 N.M. 130, 133, 869 P.2d 829, 832 (Ct. App. 1993). In this case, Ms. Parrino's testimony and the copy of the Master Services Agreement constitute evidence "tending to dispute the factual correctness" of the assessment of compensating tax for periods prior to July 1997. This shifts the burden to the Department to establish that DCSLP was engaged in mailing catalogs into New Mexico between January 1993 and June 1997.

In support of its assessment, the Department references the business activity questionnaire Emily Parrino completed at the beginning of the audit, which stated that DCSLP began mailing catalogs into New Mexico in November 1993. Ms. Parrino subsequently testified that this statement was an error on her part and that catalogs were first mailed out in 1997. Tr. 303. During the deposition of the Department's auditor in November 2005, the auditor

stated that she had no reason to disagree with Ms. Parrino's corrected statement. Ex. 1 at 191-192. The auditor could only testify "without a doubt," that catalogs were being mailed into New Mexico by February of 1998. *Id.* The DCSLP catalog attached as an exhibit to the Department's audit is dated July 1999; the catalog admitted as Exhibit K at the administrative hearing is dated February 1999. Although there is some conflict in the evidence, I accept Ms. Parrino's testimony on this issue and find that DCSLP did not begin mailing catalogs into New Mexico until July 1997.

Finally, the Department's introduction of evidence that Dell Direct Sales L.P. (the Dell sales entity targeting small to medium-sized business customers) mailed catalogs into New Mexico between January 1993 and June 1997 does not support the assessment of compensating tax against DCSLP. While Dell Direct's catalogs may have generated some calls from individual customers who were then transferred to DCSLP for service, there is no evidence that DCSLP exercised any control over the production and distribution of Dell Direct catalogs or that these catalogs targeted DCSLP's customer base of individual home consumers. The proper entity to have assessed for compensating tax on the value of catalogs Dell Direct mailed into New Mexico between 1993 and 1997 was Dell Direct, not DCSLP.

Issue IV: Whether DCSLP is liable for the ten percent negligence penalty on its failure to report and pay New Mexico gross receipts and compensating taxes during the audit period.

NMSA 1978, § 7-1-69(A) imposes a penalty of two percent per month, up to a maximum of ten percent, "in the case of failure, due to negligence or disregard

of rules and regulations" to pay taxes due to the state. Regulation 3.1.11.11 NMAC sets out several situations that may indicate a taxpayer has not been negligent, including "reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer's liability after full disclosure of all relevant facts." In this case, the testimony of Richard Salwen, who was legal counsel for Dell Computer Corporation, establishes that the company used separate legal entities as part of a tax planning strategy designed to shelter certain activities from state tax. Mr. Salwen explained the company's analysis of state tax issues as follows:

> *Ms. Gall*: In terms of structure . . . as the business changed in the ways you have described, what happened to the structure and specifically what happened with respect to tax registration and collection?
>
> *Mr. Salwen*: Well, we saw that some of the activities that these large companies wanted were going to put us in a position where those activities would subject us to the laws of the various states where they were located. And so we said, okay, we need to start paying tax, and we started a program to get registered and start collecting and paying tax to the different states. But at the same time, we had lots of other business that didn't—that wasn't done that way. We were adjusting the business for these large customers, and we said, let's set up an entity to serve them and then that entity will get to pay the tax and we'll be in good shape.

Tr. 61. And later in his testimony:

> *Mr. Fort*: In 1991, at the time this [BancTec] contract was negotiated, in fact Dell Direct L.P.

was not paying gross receipts or compensating tax to New Mexico because it took the position it did not have nexus. Is that correct?

Mr. Salwen: . . . I think that at that point we still were not paying any tax and were conducting our business so as to avoid nexus with New Mexico.

* * *

Mr. Fort: And so it is correct to assume that when you were negotiating this contract in December of 1991, that you were concerned about avoiding nexus for Dell Direct Sales L.P., isn't that correct?

Mr. Salwen: Concerned is probably too strong a word.

Mr. Fort: How would you describe it?

Mr. Salwen: I would describe it as saying that we were aware of the situation and understood that there were activities that might—that we could undertake that might establish nexus and that we needed to measure the value to our customers and ourselves versus the cost of establishing nexus. . . .

Tr. 105-106. Based on Mr. Salwen's testimony, there is no question that Dell's legal and accounting staff were making the determination as to which Dell entities, including DCSLP, were required to register and pay tax to New Mexico and other states. Whether the advice DCSLP received was correct is not relevant for purposes of the negligence exception provided in Regulation 3.1.11.11. Because DCSLP reasonably relied on the advice of its legal staff and accountants, penalty is not due.

CONCLUSIONS OF LAW

A. DCSLP filed a timely, written protest to Assessment No. 2549063, and jurisdiction lies over the parties and the subject matter of this protest.

B. DCSLP was selling property in New Mexico and is subject to gross receipts tax on its sales of tangible personal property delivered to New Mexico customers during the audit period.

C. DCSLP is subject to New Mexico compensating tax on the value of DCSLP catalogs mailed into New Mexico during the period July 1997 through June 1999.

D. DCSLP had substantial nexus with New Mexico under the standard set out in the United States Supreme Court's decision in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992).

E. Imposition of New Mexico gross receipts and compensating taxes meets the constitutional requirements set out in the United States Supreme Court's decision in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

F. DCSLP relied on the advice of its accounting and legal staff and was not negligent in failing to pay New Mexico gross receipts and compensating taxes during the audit period.

IT IS THEREFORE ORDERED:

That the Department abate the penalty assessed against DCSLP in its entirety;

That the Department abate the compensating tax and related interest assessed against DCSLP for the period January 1993 through June 1997;

That DCSLP pay the compensating tax assessed against it for the period July 1997 through June

1999, plus interest accrued to the date of payment; and

That DCSLP pay the gross receipts tax assessed against it for the period January 1993 through June 1999, plus interest accrued to the date of payment.

DATED June 22, 2006.

/s/ MARGARET B. ALCOCK
MARGARET B. ALCOCK
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the taxpayer has the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See*, NMRA, 12-601 of the Rules of Appellate Procedure. If an appeal is not filed within 30 days, this Decision and Order will become final.

[Certificate of Service Omitted]

THE SUPREME COURT
OF THE STATE OF NEW MEXICO

July 18, 2008

No. 31,181

DELL CATALOG SALES, L.P.,
Protestant-Petitioner,

v

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Respondent-Respondent.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised, Chief Justice Edward L. Chavez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson concurring, and Justice Charles W. Daniels recusing;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is **denied** in Court of Appeal number **26843**.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L Chavez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 18th day of July, 2008.

/s/ MADELINE GARCIA
Madeline Garcia, Chief Deputy Clerk

[Seal Omitted]

STATUTORY PROVISIONS INVOLVED

The Gross Receipts and Compensating Tax Act, N.M. Stat. Ann. § 7-9-1 *et seq.*, provides in relevant part as follows:

§ 7-9-3. Definitions

As used in the Gross Receipts and Compensating Tax Act:

* * * * *

N. "use" or "using" includes use, consumption or storage other than storage for subsequent sale in the ordinary course of business or for use solely outside this state.

§ 7-9-3.5. Definition; gross receipts

A. As used in the Gross Receipts and Compensating Tax Act:

(1) "gross receipts" means the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico. In an exchange in which the money or other consideration received does not represent the value of the property or service exchanged, "gross receipts" means the reasonable value of the property or service exchanged;

(2) "gross receipts" includes:

(a) any receipts from sales of tangible personal property handled on consignment;

(b) the total commissions or fees derived from the business of buying, selling or promoting the purchase, sale or lease, as an agent or broker on a commission or fee basis, of any property, service, stock, bond or security;

(c) amounts paid by members of any cooperative association or similar organization for sales or leases of personal property or performance of services by such organization;

(d) amounts received from transmitting messages or conversations by persons providing telephone or telegraph services;

(e) amounts received by a New Mexico florist from the sale of flowers, plants or other products that are customarily sold by florists where the sale is made pursuant to orders placed with the New Mexico florist that are filled and delivered outside New Mexico by an out-of-state florist; and

(f) the receipts of a home service provider from providing mobile telecommunications services to customers whose place of primary use is in New Mexico if: 1) the mobile telecommunications services originate and terminate in the same state, regardless of where the services originate, terminate or pass through; and 2) the charges for mobile telecommunications services are billed by or for a customer's home service provider and are deemed provided by the home service provider. For the purposes of this section, "home service provider", "mobile telecommunications services", "customer" and "place of primary use" have the

meanings given in the federal Mobile Telecommunications Sourcing Act; and

(3) "gross receipts" excludes:

(a) cash discounts allowed and taken;

(b) New Mexico gross receipts tax, governmental gross receipts tax and leased vehicle gross receipts tax payable on transactions for the reporting period;

(c) taxes imposed pursuant to the provisions of any local option gross receipts tax that is payable on transactions for the reporting period;

(d) any gross receipts or sales taxes imposed by an Indian nation, tribe or pueblo; provided that the tax is approved, if approval is required by federal law or regulation, by the secretary of the interior of the United States; and provided further that the gross receipts or sales tax imposed by the Indian nation, tribe or pueblo provides a reciprocal exclusion for gross receipts, sales or gross receipts-based excise taxes imposed by the state or its political subdivisions;

(e) any type of time-price differential;

(f) amounts received solely on behalf of another in a disclosed agency capacity; and

(g) amounts received by a New Mexico florist from the sale of flowers, plants or other products that are customarily sold by florists where the sale is made pursuant to orders placed with an out-of-state florist for filling and delivery in New Mexico by a New Mexico florist.

B. When the sale of property or service is made under any type of charge, conditional or time-sales contract or the leasing of property is made under a leasing contract, the seller or lessor may elect to

treat all receipts, excluding any type of time-price differential, under such contracts as gross receipts as and when the payments are actually received. If the seller or lessor transfers the seller's or lessor's interest in any such contract to a third person, the seller or lessor shall pay the gross receipts tax upon the full sale or leasing contract amount, excluding any type of time-price differential.

§ 7-9-4. Imposition and rate of tax; denomination as "gross receipts tax"

A. For the privilege of engaging in business, an excise tax equal to five percent of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referred to as the "gross receipts tax".

§ 7-9-7. Imposition and rate of tax; denomination as "compensating tax"

A. For the privilege of using tangible property in New Mexico, there is imposed on the person using the property an excise tax equal to five percent of the value of tangible property that was:

(1) manufactured by the person using the property in the state;

(2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state; or

(3) acquired as the result of a transaction which was not initially subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax.

B. For the purpose of Subsection A of this section, value of tangible property shall be the adjusted basis of the property for federal income tax purposes determined as of the time of acquisition or introduction into this state or of conversion to use, whichever is later. If no adjusted basis for federal income tax purposes is established for the property, a reasonable value of the property shall be used.

C. For the privilege of using services rendered in New Mexico, there is imposed on the person using such services an excise tax equal to five percent of the value of the services at the time they were rendered. The services, to be taxable under this subsection, must have been rendered as the result of a transaction which was not initially subject to the gross receipts tax but which transaction, because of the buyer's subsequent use of the services, should have been subject to the gross receipts tax.

D. The tax imposed by this section shall be referred to as the "compensating tax".

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

October 14, 2008

Mr. Aaron M. Panner
Kellogg, Huber, et al.
1615 M Street, NW
Suite 400
Washington, DC 20036

Re: Dell Marketing L.P., fka Dell Catalog Sales L.P. v. New Mexico Taxation and Revenue Department
Application No. 08A295

Dear Mr. Panner:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on October 14, 2008 extended the time to and including December 15, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ MELISSA BLALOCK

Melissa Blalock
Case Analyst

[attached notification list omitted]

120

No. 08-770

Supreme Court, U.S.
FILED
FEB 12 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DELL MARKETING L.P.
(FORMERLY KNOWN AS DELL CATALOG SALES L.P.),

Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of New Mexico

BRIEF IN OPPOSITION

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February 12, 2009

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a state may, consistent with the Commerce Clause, impose gross receipts taxes on sales by an out-of-state mail-order computer vendor with no physical presence in the state based on the substantial in-state presence and activities of a third party contractor that provides warranty services to in-state purchasers of the vendor's computers pursuant to contracts with the vendor through which the vendor exercises detailed management and control of the entire in-state warranty service process.

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INTRODUCTION

The Petition filed by Dell Marketing L.P. (referred to throughout as "Dell") presents no compelling reason supporting the exercise of this Court's jurisdiction. Based on the extraordinarily detailed factual record developed in the proceeding before the Taxation and Revenue Department Hearing Officer on Dell's protest, *see* Pet. at 30a-103a, the New Mexico Court of Appeals made two rulings relevant here:

> First, the New Mexico court rejected Dell's claim that its "substantial nexus" with New Mexico could only be established by a third-party contractor engaged in sales-related solicitation, because that position ignored "the reality of the relationship between BancTec [the warranty-servicing contractor] and the Taxpayer [Dell] and the critical nature of BancTec's activities to Taxpayer's business." Pet. at 21a.
>
> Second, the New Mexico court concluded that substantial nexus exists in this case because, as supported by the comprehensive factual record, "the availability of in-home . . . [warranty services provided by BancTec] was an important factor in establishing . . . [Dell's] market for sales," *id.* at 21a-22a, thereby meeting this Court's well-established *Tyler Pipe* standard for nexus. *See Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250 (1987) (quoting *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 715 P.2d 123, 126 (Wash. 1986), *vacated on other grounds*, 483 U.S. 232 (1987)) ("the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are

> significantly associated with the taxpayer's ability to establish and maintain a market in . . . [the taxing state] for the sales.")

Thus, contrary to Dell's claim, this case presents no "division of authority on . . . [an] important constitutional question." Pet. at 2. Nor did the New Mexico court "misread this Court's Commerce Clause jurisprudence," *id.* at 21, in its application of *Scripto* and *Tyler Pipe* to find nexus on the basis of Dell's substantial management and control of BancTec's provision of Dell warranty services in New Mexico and BancTec's significant activities in New Mexico on behalf of Dell. Finally, this case does not implicate any matter of "significant national importance[,]" *id.* at 28; rather, it represents the careful and thorough actions by a state tax protest authority, and the reasoned appellate review of those actions with respect to the fact-bound inquiry mandated by this Court's established jurisprudence on how to determine substantial nexus in this context.

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals, fully reproduced in the Pet. at 1a-29a, is now reported at *Dell Catalog Sales L.P. v. Taxation and Revenue Dep't*, No. 26,843, 2009-NMCA-001, 2008 WL 5505860 (N.M. Ct. App. June 2, 2008), *cert. denied*, 189 P.3d 1215 (N.M. 2008).

JURISDICTION

In addition to the jurisdictional matters properly described in the Pet. at 3, on December 22, 2009, the Deputy Clerk of this Court extended the time for the filing of this response to the petition for a writ of certiorari to and including February 13, 2009.

SUPPLEMENTAL STATEMENT OF THE CASE

Dell's Statement is substantially correct as far as it goes, but it leaves out critical portions of the evidentiary record before the Hearing Officer, which was the basis for the Commerce Clause decision of the Hearing Officer as affirmed by the New Mexico court.[1] Those additional evidentiary findings are as follows:

1. Dell's computers were initially covered by a limited "return-to-factory" warranty, but in response to customer demands in the mid-1980s, Dell began offering third-party, on-site service contracts to its customers. The first such third-party contract was terminated because of complaints of poor service for which Dell was blamed, and the second was terminated because the increased cost imposed would

[1] For the same reason, Dell's "Question Presented" fails adequately to include important factual predicates to formulate fairly the question that is actually presented in this particular case. *See* Respondent's reformulation of the Question Presented, *supra*.

reduce the number of contracts and make Dell's customers unhappy. *See* Pet. at 34a-36a.

2. Dell then entered into Brokerage Agreements with BancTec, under which Dell sold BancTec service contracts to its customers and BancTec acted as the exclusive provider of on-site repair service for Dell computer products. *See id.* at 36a.

3. Customers had to purchase the BancTec service contract through Dell, and BancTec's name did not appear in Dell's catalogue. Dell set the price for the contract; it often bundled the cost of the service contract into a single price charged for a complete computer set up; BancTec was required to accept all service contracts sold by Dell; and approximately 75 percent of Dell's New Mexico customers purchased the contract. *See id.* at 38a.

4. Under the Brokerage Agreements, customer problems were reported to Dell and not to BancTec; Dell authorized the dispatch of BancTec technicians to the customer's address; and "[d]uring the audit period, *Dell Tech Support dispatched BancTec technicians on 1,273 service calls and installation visits to customers in New Mexico.*" *Id.* at 39a (emphasis added).

5. The Brokerage Agreement set out detailed "Service Call Procedures" and requirements for tracking service calls that BancTec was required to follow. The Agreement also required BancTec service technicians to conduct themselves in a way that would "professionally and positively represent . . .

[BancTec and] Dell Computer Corporation and other [Dell] partners." *Id.* at 39a-40a.

6. In the event a customer was not satisfied with the service, the complaint was registered with Dell and not BancTec; BancTec's warranty ran to Dell and not to the customer; and if BancTec's performance fell below 95 percent for two consecutive months, Dell retained the right to take over BancTec's service obligations. *See id.* at 41a.

7. The availability of in-home service was an important factor in establishing Dell's market for sales. *See id.*

In her analysis of the substantial nexus question, the Hearing Officer gave a detailed recitation of all of the facts of record relevant to nexus, *see id.* at 69a-71a, and found those facts demonstrative of "the degree of control exercised by . . . [Dell]" over "the sale and the manner of execution of BancTec's service contracts with . . . [Dell's] customers." *Id.* at 69a. On the basis of that summary, the Hearing Officer concluded:

> The record in this case provides overwhelming evidence that . . . [Dell] controlled and directed BancTec's performance of repair services for . . . [Dell's] customers. . . . [Dell's] characterization of BancTec as an independent service provider acting solely on its own behalf simply does not correspond to the facts.

Id. at 72a. Furthermore, that detailed factual development, virtually ignored in the Petition, led the New Mexico court to focus on Dell's control of the extensive service being provided in New Mexico, *see id.* at 22a, in holding that Dell, "through its relationship with BancTec and BancTec's activities in New Mexico, had a substantial nexus with New Mexico, and thus, that the Department's imposition of gross receipts tax does not violate the Federal Constitution on Commerce Clause grounds." *Id.* at 23a. Based on that analysis, the New Mexico court concluded:

> Our opinion today merely reflects the reality of today's modes of commerce and recognizes that Taxpayer has chosen to conduct its business in such a manner as to benefit from an in-state presence acting on its behalf, all while trying to avoid paying tax on sales to which other New Mexico businesses are subject.

Id. at 24a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG STATE COURTS REGARDING THE SCOPE OF *SCRIPTO* AND *TYLER PIPE*.

Dell asks this Court to review the decision of the New Mexico Court of Appeals, alleging that a conflict exists among state courts regarding the scope of *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), and *Tyler*

Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987). *See* Pet. at 1-2, 12-21. There is no such conflict concerning the applicable law. Rather, Dell's selective citations to the applicable cases avoids the essential holdings of those cases which, when fairly stated, demonstrate that they all properly apply the principles of *Scripto* and *Tyler Pipe*. The difference in results stems from the different factual circumstances confronted in those cases.

Both *Scripto* and *Tyler Pipe* addressed whether Commerce Clause "substantial nexus"[2] could be established between a taxing state and an out-of-state vendor when an in-state third party – not an employee or agent of the out-of-state vendor – performed services on behalf of the out-of-state vendor. The services in both cases involved solicitation of sales for the out-of-state vendor, and in both cases, this Court held that the substantial solicitation activities of the third party for the benefit of the out-of-state vendor were sufficient to establish nexus between the taxing state and the out-of-state vendor, even in the absence of formal employment or agency

[2] *Scripto* also involved "minimum contacts" nexus required by the Due Process Clause to allow jurisdictional authority over out-of-state defendants. *See Scripto*, 362 U.S. at 208, 210-11. This Court has distinguished "due process" nexus from the "substantial nexus" required under its Dormant Commerce Clause analysis. *See Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 305 (1992). Due process nexus is not involved in this case.

status. *See Scripto*, 362 U.S. at 211-12; *Tyler Pipe*, 483 U.S. at 250-51.

In neither of those cases, however, nor in any other case, has this Court limited the type of non-employee, non-agent in-state activity on behalf of out-of-state vendors that can result in substantial nexus between the out-of-state vendor and the taxing state. On the contrary, this Court in *Tyler Pipe* made clear that "the crucial factor governing nexus is whether the activities performed in . . . [the taxing state] on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market . . . [in the taxing state] for . . . [its] sales." *Tyler Pipe*, 483 U.S. at 250 (quoting *Tyler Pipe*, 715 P.2d at 126).

Dell's conflict argument fails because it misreads the holdings of two groups of cases to create what can only be described as a false conflict. First, it erroneously characterizes one group of state cases as ruling that "indirect benefits – unlike the solicitation found sufficient to confer nexus in *Scripto* and *Tyler Pipe* – [must be] . . . insufficient to impute the physical presence of the in-state entity to the out-of-state mail order vendor for purposes of taxing the out-of-state vendor's sales." Pet. at 19-20. It then misconstrues another group of cases – including the New Mexico court's ruling in this case – as reading "*Scripto* and *Tyler Pipe* broadly to permit taxation of sales by an out-of-state seller as long as an in-state third party engages in [any] activities that benefit the

out-of-state seller[,]" *Id.* at 20, when that is just not the case.

Although the cases in each group reach different conclusions, no conflict exists among them, because they all ask the same question: Whether the third party's activities performed on behalf of the out-of-state vendor were substantial enough to attribute the third party's presence in the taxing state to the out-of-state vendor because those activities were "significantly associated with the taxpayer's ability to establish and maintain a market . . . [in the taxing state] for . . . [its] sales," as required by *Tyler Pipe*. *Tyler Pipe*, 483 U.S. at 250.

Contrary to Dell's erroneous reading, the Pennsylvania, Connecticut, Ohio and Tennessee court cases only held that the in-state activities of the third party were not significant enough to create nexus under the *Tyler Pipe* standard, while the courts in New Mexico, Louisiana and California concluded that the activities were so significant that they did establish nexus under that standard. All the cases employed the same constitutional standard, and reached different conclusions based only on the particular facts at issue.

A. The Pennsylvania, Connecticut, Ohio and Tennessee Precedents.

Dell erroneously asserts that the courts in the following decisions held that in order to create substantial nexus, the activities of third parties "must

directly promote ... sales[,]" for the out-of-state vendor: *Bloomingdale's By Mail, Ltd. v. Pennsylvania Dep't of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd mem.*, 591 A.2d 1047 (Pa. 1991) (per curiam), *cert. denied*, 504 U.S. 955 (1992); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991); *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995); and *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *appeal denied*, (Tenn. May 8, 2000), *cert. denied*, 531 U.S. 927 (2000). *See* Pet. at 13. Contrary to Dell's assertions, none of these cases held that a third party must be involved directly in promoting the in-state vendor's sales for the purpose of establishing substantial nexus.

In *Bloomingdale's By Mail*, taxpayer, By Mail ("taxpayer"), was a subsidiary of Federated Department Stores, Inc. ("Federated Stores") and sold merchandise nationally by mail order, including to customers in Pennsylvania. *See* 567 A.2d at 775. The customers ordered merchandise advertised in catalogues that had been sent to them by mail; the merchandise was then sent to the customers by common carrier or U.S. mail. *See id.* at 775-76. Customers could return merchandise directly to taxpayer for a refund or exchange. *See id.* at 776. Taxpayer itself had no physical presence in Pennsylvania. *See id.* at 775-76.

A division of Federated Stores operated Bloomingdale's stores in Pennsylvania. *See id.* The Bloomingdale's stores did not solicit orders for taxpayer, nor

did taxpayer solicit orders for them. *See id.* at 778. The only evidence showing any relationship between taxpayer and the Bloomingdale's stores was (i) taxpayer was a subsidiary of Federated Stores which owned the Bloomingdale's stores; (ii) on two occasions, customers of taxpayer returned merchandise to the Bloomingdale's stores; (iii) taxpayer and the Bloomingdale's stores sold similar merchandise; and (iv) taxpayer and the Bloomingdale's stores employed the same advertising and sales motif. *See id.* at 776, 778.

The *Bloomingdale's By Mail* court held that the Bloomingdale's stores' presence in Pennsylvania would not be attributed to taxpayer merely because taxpayer was a subsidiary of Federated Stores. *See id.* at 778. Entity affiliation does not establish nexus between the taxing state and the out-of-state vendor. *See id.* The court also held that two returns, the sale of similar merchandise and the same advertising and sales motif were not sufficient to establish nexus. *See id.* The reasoning of the court was not that nexus could only have been established if the Bloomingdale's stores had solicited orders for taxpayer, but that the evidence failed to show that their total activities were significant enough to establish nexus: "Absent something more, this Court fails to see how such a similarity can constitute a nexus for . . . tax purposes." *Id.* at 778.

In *SFA Folio Collections, Inc. v. Bannon*, Connecticut attempted to impose sales and use taxes on taxpayer, Folio, a mail order subsidiary of Saks &

Company ("Saks"). *See* 585 A.2d at 668-69. Saks also owned Saks-Stamford, which operated a retail store in Connecticut. *See id.* at 669. Thus, Folio and Saks-Stamford were affiliated ("sister") companies. Folio had no physical presence in Connecticut; its only connections to Connecticut were: (i) it mailed catalogues to customers in Connecticut; (ii) customers could call a toll free number to place orders; (iii) Folio advertised in magazines that were not published in Connecticut, but that reached residents of Connecticut; and (iv) Folio sent copies of its catalogues to the Saks-Stamford store, which then used the catalogues to inform employees of fashion trends, as reference guides and for educational purposes. *See id.* at 669, 671.

After concluding that nexus between Folio and Connecticut could not be established merely because Folio and Saks-Stamford were affiliate companies, the court held that Folio had insufficient contacts with Connecticut under *Nat'l Bellas Hess, Inc. v. Ill. Dep't of Revenue*, 386 U.S. 753 (1967), to support its ability to impose sales and use taxes on Folio. *See* 585 A.2d at 671. Specifically, the Court stated that the catalogues that Folio had sent to Saks-Stamford did not create third-party nexus; the catalogues "do not establish a link to Connecticut because these catalogues are used for employee training and reference purposes, not for purpose of having the Saks-Stamford employees solicit Folio sales from Connecticut residents." *Id.* As in *Bloomingdale's By Mail*, the court's decision was not that direct solicitation of

sales is the only activity by which a third party can establish nexus, but that, under the facts, Saks-Stamford's activities did not create nexus between Folio and Connecticut. *See id.*

In *SFA Folio Collections, Inc. v. Tracy*, Ohio attempted to find nexus between Folio and Saks Fifth Avenue of Ohio, Inc. ("Saks-Ohio"), both subsidiaries of Saks & Company, Inc. ("Saks"). *See* 652 N.E.2d at 694. Folio had no physical presence in Ohio. *See id.* at 697. Its only relationship to Ohio was that it solicited sales from Ohio residents by catalogue, and it sent catalogues to the Saks-Ohio stores. *See id.* at 694, 697. One store used the catalogues to train employees, while the other store kept catalogues under the counter to show customers who asked for a catalogue. *See id.* at 695. Each store had its own policy with respect to returns of merchandise sold by Folio, and any returns were included in that store's inventory and sold by the store. *See id.* at 695, 697. The store never informed Folio that its merchandise had been returned. *See id.* at 695. The returns were minimal, in comparison to Saks-Ohio total returns. *See id.* at 695, 697. When customers requested merchandise that a store did not have, the store's search for the merchandise did not include a search of Folio's inventory, and the Saks-Ohio stores did not place orders for Folio customers. *See id.* at 695.

After again rejecting nexus based upon the corporate affiliation of Saks-Ohio and Folio, the Ohio Supreme Court held that nexus with Folio could not be established by Saks-Ohio because Saks-Ohio did

not "own or operate an in-state place of business for Folio." *See id.* at 695-97. The court also concluded that the Folio returns accepted by Saks-Ohio stores did not create nexus, because Saks-Folio accepted those returns for its own, not Folio's, benefit, and those returns were minimal. *See id.* at 697.

Dell also relies on *J.C. Penney Nat'l Bank v. Johnson* ("*JCPNB*") to support its argument that a conflict exists among state courts concerning whether a non-agent third party can create substantial nexus when the third party's activities do not promote sales. Pet. at 13, 18. *JCPNB*, however, does not so hold.

The court in *JCPNB* decided against third-party nexus after reviewing all the facts. *See* 19 S.W.3d at 840-42. It concluded that the third parties did not perform services on behalf of taxpayer JCPNB that substantially contributed to the bank's ability to maintain its credit card operations in Tennessee. *See id.* at 841-42. The court's reference to solicitation of sales related to the manner in which third parties could substantially contribute to the bank's maintaining its operations in Tennessee, not as a Commerce Clause substantial nexus requirement. *See id.*

Moreover, *JCPNB* has been clarified in *American Online, Inc. v. Johnson*, No. M2001-00927-COA-R3-CV, 2002 WL 1751434 (Tenn. Ct. App. July 30, 2002) ("*AOL*"). Like *JCPNB*, the question in *AOL* was whether nexus between an out-of-state vendor and Tennessee was established by the activities of third parties who were not soliciting sales in Tennessee. In

AOL, the third parties were network service providers that facilitated AOL to access AOL servers. *See id.* at *1. *AOL* specifically recognizes that nexus can be established by a third party even if that party did not solicit business for the out-of-state vendor. *See* at *3 (citing *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977)). In finding nexus, the court stated:

> We do not think the record shows that the activities conducted here on AOL's behalf could be termed inconsequential or of only slight significance. We think that AOL's connection with this state amounts to more than the Internet mail and common carrier connections in *Quill* and *Bellas Hess*.

Id. at *3; *see also Arco Bldg. Sys., Inc. v. Chumley*, 209 S.W.3d 63 (Tenn. Ct. App. 2006), *appeal denied* (Tenn. 2006) (nexus established between out-of-state vendor and Tennessee through activities of in-state manufacturers, engineers and companies authorized to collect payment from customers and provide post-delivery consulting services.).

Thus, none of the foregoing cases cited by Dell supports its contention that only sales-related activities can meet the *Tyler Pipe* standard of third-party activities that can sufficiently bind the out-of-state vendor to pay gross receipts taxes on its sales in the

taxing state.[3] As a result, those cases do not stand "in conflict" with the cases from California and Louisiana cited by Dell and the instant New Mexico case, all of which concluded, on the basis of particular facts presented, that the in-state activities of the third party were sufficient to meet the *Tyler Pipe* legal standard.

B. The New Mexico, Louisiana and California Precedents

Dell erroneously asserts that in this case the New Mexico court "read *Scripto* and *Tyler Pipe* . . . to permit taxation of sales by an out-of-state seller as long as an in-state third party engages in [any] activities that benefit the out-of-state seller." Pet. at 20. In doing so, Dell misstates the clear holding here and the basis for it. It ignores the important ruling of the Hearing Officer, that:

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[3] The same is true of the one federal court decision cited by Dell Pet. at 13, N. 11. *See St. Tammany Parish Tax Collector v. Barnesandnoble.com,* 481 F. Supp. 2d 575 (E.D. La. 2007). That case did point out that the policy of a related company to accept returns from the out-of-state, internet seller was not comparable to the sales contractor in *Scripto* and *Tyler Pipe,* but it also made clear that its ruling was based on the lack of comparability to "the level of sales or *sales support activity* undertaken by in-state agents in other cases in which courts have found nexus." *Id.* at 582 (emphasis added) (citing, among other cases, *State v. Dell Int'l, Inc.,* 922 So. 2d 1257 (La. App. 2006), and *Borders Online, LLC v. State Bd. of Equalization,* 29 Cal. Rptr. 3d 176 (Cal. Ct. App. 2005) – both cases Dell erroneously claims are in conflict with *St. Tammany Parish*).

> The record in this case provides overwhelming evidence that . . . [Dell] controlled and directed BancTec's performance of repair services for . . . [Dell's] customers. . . . [Dell's] characterization of BancTec as an independent service provider acting solely on its own behalf simply does not correspond with the facts.

Pet. at 72a.

Dell further ignores that it was on the basis of such "overwhelming evidence" that the New Mexico court was compelled to hold that Dell, "through its relationship with BancTec and BancTec's activities in New Mexico, had a substantial nexus with New Mexico, and thus, that the Department's imposition of gross receipts tax does not violate the Federal Constitution on Commerce Clause grounds." *Id.* at 23a. Thus, this case is nothing more than a proper application of the *Tyler Pipe* principle – that where the out-of-state vendor so controls and manages the activities of the in-state contractor and those activities are "significantly associated with the taxpayer's ability to establish and maintain a market," there is sufficient nexus to hold the vendor responsible to pay gross receipts taxes in that state.

Dell similarly mischaracterizes the relevant Louisiana and California precedents to create a false conflict with previously discussed cases that find no sufficient nexus. *State v. Dell Int'l, Inc.*, 922 So.2d 1257 (La. App. 2006), is identical to the instant case, and like this case, the result in favor of nexus was

based on "the extent and the nature of the services provided by BancTec to Dell's Louisiana customers as well as the impact of this service on Dell's ability to establish and maintain a lucrative market in . . . [Louisiana]." *Id.* at 1266.

Borders Online, LLC v. State Bd. of Equalization, 29 Cal. Rptr. 3d 176 (Cal. Ct. App. 2005), rejected Dell's claim that an in-state representative must be engaged in solicitation of sales because it concluded – on the basis of a substantial evidentiary record – that the activities of the in-state representative were part of the out-of-state vendor's "strategy to build a market in California[,]" by "cross-selling synergy" involving the in-state entity accepting returns from the online affiliate; using similar logos; and in-state store receipts imprinted with Online's web addresses. *See id.* at 190.

Finally, Dell relies on one sentence from the Hellerstein treatise, *see* Pet. at 16, to suggest a confusion in the law that neither exists, nor is supported by a fair reading of the treatise's balanced treatment of the subject of this law suit. The Hellerstein treatise indicates that although this Court has not specifically addressed the question presented here, that question has been properly decided by state courts on a fact specific, case-by-case basis. *See* Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶¶ 19.02[2][2][a0] (Warren Gorham & Lamont 3d ed. 1998) ("Hellerstein"). Furthermore, the Hellerstein treatise does not indicate that any conflict exists among state courts. *See id.*

Thus, all the cases represent a proper and consistent application of *Scripto* and *Tyler Pipe*. Dell's effort to characterize the cases differently creates a false conflict that does not merit this Court's time and attention.

II. THE NEW MEXICO COURT DID NOT ERR IN FINDING NEXUS ON THE BASIS OF DELL'S DETAILED MANAGEMENT AND CONTROL OF BANCTEC'S SUBSTANTIAL PROVISION OF DELL'S WARRANTY SERVICES IN NEW MEXICO

Dell's contention that the lower court erred in finding nexus on the basis of anything other than third party sales solicitation efforts on behalf of Dell, *see* Pet. at 21-28, is as unworthy of review as its claim of conflict among the states, *see* Point I, *supra*, and for many of the same reasons. First, there is no authority in the precedents of this Court or the state courts for the proposition that the in-state actions of third parties can *only* be attributed to out-of-state vendors for "substantial nexus" purposes if those third-party in-state activities can be categorized as "sales activities." Second, contrary to Dell's contention, the New Mexico court did not "misread this Court's Commerce Clause jurisprudence[,]" *id.* at 21; rather Dell mischaracterizes the basis of an intensely fact-based question resolved by the New Mexico court (and the rulings of the other lower courts in this area). When the factual record gaps in the Petition are filled, it becomes clear that the decision of the

New Mexico court was eminently correct, and not in need of the further review of this Court.

A. The Law Governing the In-State Activities of Third Parties Sufficient to Establish the "Substantial Nexus" of an Out-Of-State Vendor with no Presence in the Taxing State.

Dell is correct that *Bellas Hess* and *Quill* established a bright-line rule that "the Commerce Clause bars a state from taxing out-of-state mail-order vendors that lack a physical presence . . . [when the] '*only connection* with customers in the taxing State is by common carrier or the United States mail[.]' " Pet. at 21-22 (emphasis added). And it is true that *Scripto* and *Tyler Pipe* made clear that the sales-related activities of third parties on behalf of such out-of-state vendors can be sufficient to meet the "substantial nexus" Commerce Clause requirement. But none of this Court's cases, either before or after *Bellas Hess* and *Quill,* has ever established that only sales related activities of third parties can ever meet that requirement. *See* Hellerstein, *supra*, ¶ 19.02[2][a0] ("There is nothing in either *Scripto* or *Tyler Pipe* to suggest that their analysis should be so narrowly confined, and courts have properly rejected such a crabbed reading of those opinions. . . . Plainly, there are market-maintaining and market-establishing activities that do not involve solicitation.").

Rather, as explained in Respondent's review of the *Tyler Pipe* standard, and the thoroughly consistent state court cases applying that standard, *see* Point I, *supra,* the question always involves a fact-based inquiry into the nature, scope and extent of the third-party's in-state activities and the extent to which such activities further the out-of-state vendor's attempt to create and maintain a market in that state. *See* Hellerstein, *supra,* ¶ 19.02[2][e] ("Ultimately, the line between those types of activities of independent parties that will and will not subject an out-of-state seller to use tax collection obligations will have to be worked out on a case-by-case basis.") Under that standard, the factual record in this case overwhelmingly supports a finding of "substantial nexus" between Dell and New Mexico sufficient to support the taxation of Dell's New Mexico sales, especially given the heavy involvement of Dell with respect to the control and details of the services provided by BancTec, the third party service provider. *See* Point I, *supra.*

B. Dell's Mischaracterization of the Intensely Fact-Based Question Resolved by the New Mexico Court.

By ignoring the substantial factual record in this case, Dell continues to mischaracterize both the ruling and implications of the New Mexico court's judgment. Nothing in that judgment even remotely suggests that a state may "tax an out-of-state entity based on in-state activities of unrelated third parties,

not undertaken on the taxpayer's behalf, merely because those activities facilitate the *use* of a product after the sale." Pet. at 22. Rather, in this case the evidence was overwhelming that BancTec is much more than an "unrelated third party," *see* Pet. at 69a-72a; that much of BancTec's considerable in-state activity was undertaken on Dell's behalf, *see id.*; and that those activities do much more for Dell than facilitate "use of a product after the sale." *See id.* Indeed, the evidence established that BancTec's activities on behalf of itself *and Dell*, were "an important factor" in the establishment and maintenance of Dell's market for sales in New Mexico. *See id.* at 41a.

In the face of this substantial record, Dell cannot support its contention here that "BancTec's activities are not related to the 'activity' to which the state 'tax is applied.'" *id.* at 24. Even Dell's one attempt to dip into the record – its citation to *id.* at 38a – does not support its direct contention that BancTec *only* "carried out its repair activities to fulfill its own obligations to the customers." *Id.* at 25.

Thus, this is not a case about an "unrelated third party," undertaking activities within the taxing state only for its own benefit, and only to facilitate the "*use* of a product after the sale," *Id.* at 22 – not where Dell did not disclose to its customers in its catalogues that the service contract was with BancTec; maintained all the service repair relationship with the customers; maintained detailed direction and control over those services; and did so because of the importance of those services to its creation and maintenance of its

market in New Mexico. Under these particular, and well-developed factual circumstances, the New Mexico court properly concluded that its decision properly recognizes "the reality of today's modes of commerce and recognizes that Taxpayer has chosen to conduct its business in such a manner as to benefit from an in-state presence acting on its behalf, all while trying to avoid paying tax on sales to which other New Mexico businesses are subject." *Id.* at 24a.

Indeed, Declaratory Ruling, *In re Gateway 2000, Inc.*, No. 96-30-6-0033, 1996 Iowa Tax LEXIS 2 (Iowa Dep't Revenue & Fin. Mar. 19, 1996), cited by Dell, *see* Pet. at 26, fully supports Respondent, when one considers the full quote from that case. As the Director in that Declaratory Ruling made clear, it was "*[b]ased upon the factual situation presented*," that he was able to conclude that the service warranty work in that case was "not performed on 'behalf of or at the direction of'" the computer manufacturer. *Id.* at *5 (emphasis added). And Dell further fails to point out that the "factual situation presented" in that case involved a service provider who sold its own contracts to customers; the customers requested services directly from the service company and not from Gateway; Gateway did not obtain the service fees and reimburse the provider for its work; and Gateway did not control the flow of replacement parts, *see id.* at *1-3 – all in marked distinction from the instant case where Dell controlled all of the features of the service contract, thereby insuring that the service was "performed on behalf of" and "at the direction of" Dell.

III. THE ISSUE PRESENTED IS NOT ONE OF SIGNIFICANT NATIONAL IMPORTANCE

Dell grossly overstates matters when it implies that this case "involves the constitutional limits on state taxation" for the entire industry of Internet sales. Pet. at 28. That is just not so. Rather, it only affects those out-of-state vendors that make a business judgment to build, and micro-manage, a large service component; that insist upon control over whether such service is to be provided, and under what circumstances; that do not fully disclose the identity of the third party service provider in its dealings with its buyers; and that does all the foregoing as a way to serve its own interest in the maintenance of its local market.

Once again, Dell asserts a need for this Court's review based on a "disuniformity and confusion" flowing from "various interpretations of this Court's Commerce Clause jurisprudence," Pet. at 30, which do not exist. Rather, as fully elaborated above, *see* Point I, *supra,* this Court has established a uniform, and workable, legal principle which the lower courts have no difficulty applying: A state may impose its sales and use taxes on an out-of-state vendor who contracts with an in-state third party to perform services for the out-of-state vendor that are significant and on behalf of the out-of-state vendor as part of the out-of-state vendor's overall plan to establish and maintain its market in that state. As illustrated by the cases discussed in Point I, *supra*, the court's analysis must focus on the record in each case to

determine whether that evidence is sufficient to support a conclusion that the third-party activities were significant and in furtherance of establishing and maintaining a market in the state. *See Dell Catalog Sales, L.P. v. Comm'r of Revenue Serv.*, 834 A.2d 812 (Conn. Super. Ct. 2003) and *In re Gateway 2000, Inc., supra,* 1996 Iowa Tax LEXIS at *2, where the court and Director concluded that the facts did not support a finding of substantial nexus. Taxpayers, like Dell, who attempt to avoid taxes, by means of arrangements whereby they control the third parties' activities will be subject to taxes; those that do not, will not be subject to taxes. The principle is consistent with *Quill*, *Scripto* and *Tyler Pipe*. Dell, and similar Internet and catalogue sellers, can plan their business accordingly.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

DELL MARKETING L.P.
(FORMERLY KNOWN AS DELL CATALOG SALES L.P.),
Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

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February 25, 2009

CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page ii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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CONSTITUTION

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The Taxation and Revenue Department of New Mexico ("Department") argues that review of the decision below is unwarranted because state courts' divergent treatment of states' efforts to impose sales or use taxes on out-of-state vendors reflects divergent facts, not divergent constitutional standards. But the Department misreads both the conflicting state court judgments and the decision below. On the one hand, decisions in Connecticut, Ohio, Pennsylvania, and Tennessee have held that the activities of third parties failed to establish constitutional nexus – even where those third parties carried out in-state activities that benefited the out-of-state vendor – where the third party did not solicit sales subjected to tax. By contrast, the decision below upheld the imposition of tax on sales by an out-of-state vendor because an in-state non-agent offered post-sale service on its own behalf.

The different outcomes reflect basic disagreement concerning the principles governing states' power to tax interstate commerce as explained by this Court in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). *Tyler Pipe* holds that "the crucial factor governing nexus is whether the activities performed in th[e] state *on behalf of the taxpayer* are significantly associated with the taxpayer's ability *to establish and maintain a market in th[e] state for the sales*." 483 U.S. at 250 (emphases added). As leading commentators have recognized, the Court's statement leaves open the question presented here: whether activities of non-agent third parties can be said to help "establish and maintain a market . . . for the sales" subjected to tax where the third parties do not solicit the sales in question. The Court should grant certiorari to resolve that important issue.

ARGUMENT

I. THE DECISION BELOW DEEPENS A SPLIT IN STATE COURT AUTHORITY OVER THE CONSTITUTIONAL STANDARD FOR FINDING SUBSTANTIAL NEXUS

The Department argues that there is no split of authority because states have uniformly understood *Tyler Pipe* and *Scripto* to permit imposition of taxation on out-of-state vendors if (1) an in-state third party is carrying out activities that contribute to the viability of the out-of-state vendor's sales and (2) those in-state activities are sufficiently "substantial" in the judgment of the reviewing court. The Department's effort to reconcile the divergent state court decisions is unpersuasive. Decisions from courts in four states reflect the correct understanding that, where non-agent third parties do not solicit the sales that are subject to tax, their activities cannot create the constitutionally required "nexus" to tax those sales.

A. In *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio 1995), the Ohio Supreme Court held that the "selling activity" of out-of-state vendor Folio did "not have substantial nexus with Ohio" – despite the activities of Saks-Ohio, a physical retailer in the state that shared a corporate parent with Folio – because Saks-Ohio "does not sell any merchandise for Folio," even though Saks-Ohio distributed Folio catalogs and accepted returns of Folio merchandise. *Id.* at 697. The court thus made clear that the critical distinction was between solicitation of sales subject to tax and other activities that "might provide minimal connection under due process standards" but that do not "create substantial nexus" sufficient to satisfy the Commerce Clause. *Id.* The Depart-

ment claims (at 14) that Saks-Ohio's activities were insufficient because they were "for its own, not Folio's, benefit" and because the returns were "minimal." But that is the Department's rationale, not the court's. The court did not (and could not plausibly) say that the acceptance of returns did not benefit Folio – plainly it did – nor did it say that the returns were minimal – only that they were "a minimal *part* of the returns Saks-Ohio received." 652 N.E.2d at 697 (emphasis added).

The court in *Bloomingdale's By Mail, Ltd. v. Commonwealth, Department of Revenue*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd mem.*, 591 A.2d 1047 (Pa. 1991) (per curiam), addressing a similar situation, likewise held that affiliated retail stores' non-sales activities, including accepting returns, distributing catalogs, and sharing marketing and sales motifs, could not support a finding of nexus for purposes of imposing taxation on an out-of-state catalog vendor. In distinguishing *Scripto* and parallel state authority, the court articulated the very standard that the New Mexico court rejected – that is, the court found an absence of nexus because "Bloomingdale's stores . . . do not solicit orders on By Mail's behalf nor act as its agents in any fashion." *Id.* at 778. The Department attempts (at 11) to reconcile the case by suggesting that the stores accepted only "two returns," but this is incorrect: those "two returns" were made by employees of the state taxing authority, apparently to determine whether such returns would be accepted. *See* 567 A.2d at 776. The decision does not give any indication of the total volume of By Mail returns that Bloomingdale's stores accepted.

The court in *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), similarly distinguished *Scripto* and *Tyler Pipe*, holding that an in-state physical retailer did not create nexus for an out-of-state mail-order company by distributing mail-order catalogs because the catalogs were not distributed "for the purpose of having the [physical retailer's] employees solicit [mail-order] sales from Connecticut residents." *Id.* at 671. The Department does not explain what "facts" (Opp. 12-13) – *other* than the presence of agents or the solicitation of sales – would have satisfied the Connecticut court when the documented non-solicitation activities of the retail stores were insufficient.

Finally, the court in *J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), rejected a finding of substantial nexus between the state and the credit card affiliate of a physical retailer because "one could not apply for the . . . credit cards at the . . . retail stores, nor could individuals make a payment . . . at the retail stores." *Id.* at 841. The court held that "*solicitation, which was the most important function* in allowing [the credit card affiliate] to maintain its business, took place through the U.S. Mail, which, under the holding in *Quill* [*Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992),] does not allow a finding of substantial nexus." *Id.* (emphasis added). It was thus the absence of solicitation activities that made *Scripto* and *Tyler Pipe* "clearly distinguishable." *Id.* at 842.

The Department argues (at 14) that *J.C. Penney* can be disregarded because *America Online, Inc. v. Johnson*, No. M2001-00927-COA-R3-CV, 2002 WL 1751434 (Tenn. Ct. App. July 30, 2002), "clarified" its holding. But the *America Online* court did not

address the issue of whether a third party's activities could be attributed to an out-of-state vendor; instead, it held, reversing a grant of summary judgment to the taxpayer, that there were disputed questions of fact whether the taxpayer *itself* had a physical presence in the state. *See id.* at *3. *America Online* is therefore inapposite.[1]

Contrary to the Department's argument, these courts understood *Scripto* and *Tyler Pipe* to depend on the fact that in-state third parties solicited the sales subjected to tax. One federal court has adopted the reasoning of the state courts described above, observing that "[t]he absence of such activity [*i.e.*, solicitation of sales] by the in-state affiliate was significant in cases finding no nexus." *St. Tammany Parish Tax Collector v. Barnesandnoble.com*, 481 F. Supp. 2d 575, 581 (E.D. La. 2007) (citing *Tracy*, *Bannon*, and *Bloomingdale's*). In that case, the court held on similar facts that third-party nexus could not lie unless the third party "marketed [the vendor's] products on [the vendor's] behalf," *id.* at 580, "act[ed] as a marketing presence," was "tantamount to acting as a sales presence," or "has . . . taken or solicited orders on behalf of [the vendor]," *id.* at 581.

B. The New Mexico Court of Appeals rejected the argument that *Scripto* and *Tyler Pipe* stand for the principle that, "for a [non-agent] third party to establish substantial nexus, the third party must be engaged in sales-related activities." Pet. App. 21a; *see* Dell C.A. Br. 32-35. Instead, the New Mexico

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[1] Similarly, the taxpayer in *Arco Building Systems, Inc. v. Chumley*, 209 S.W.3d 63 (Tenn. Ct. App. 2006), carried on activities in the state that placed it "well beyond the narrow safe harbor of *National Bellas Hess*[, *Inc. v. Department of Revenue*, 386 U.S. 753 (1967),] and *Quill*." *Id.* at 75.

court held that BancTec's non-sales activities "helped [Dell] establish and maintain a market" for its computers and were therefore sufficient to subject Dell to gross receipts tax on sales of its computers to New Mexico residents. Pet. App. 21a (internal quotation marks omitted). The New Mexico court thus joined courts in Louisiana and California in holding that activities other than solicitation of the sales subjected to tax met *Scripto*'s and *Tyler Pipe*'s standard for third-party nexus. *See Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176, 189 (Cal. Ct. App. 2005) (rejecting as "too constricted" the "position that a state has no authority to impose a tax collection duty on an out-of-state retailer unless its in-state representative is actually making sales transactions, as was the case in *Scripto* [and] *Tyler Pipe*") (internal quotation marks and emphasis omitted); *State v. Dell Int'l, Inc.*, 922 So. 2d 1257, 1263 (La. Ct. App. 2006); *see also id.* at 1267 (McClendon, J., dissenting) (dissenting on ground that "BancTec does not solicit sales for Dell").

That more permissive standard is in conflict with the analysis of the several cases rejecting imposition of state sales tax. There is no principled reason, under the standard adopted in the decision below, that activities such as accepting returns or distributing catalogs are insufficient to constitute nexus. This Court's review is warranted to address these divergent interpretations of the governing constitutional standard.

II. THE DECISION BELOW UNDERMINES THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

The Department insists that the court below correctly resolved the "intensely fact-based question" put before it and emphasizes certain characteristics of BancTec's activities that made it reasonable for the court below to find that those activities could be attributed to Dell for purposes of establishing "substantial nexus." Opp. 19. In so arguing, the Department mistakes a question of governing legal standards – which the petition presents – for a dispute about application of standards to facts. Consequently, the Department fails to address the reasons why the "chancellor's foot" substantial-nexus test adopted below is inconsistent with this Court's decisions.

First, in the context of a state's efforts to impose a sales or use tax on out-of-state mail-order vendors, the in-state activities of a third party sufficient to confer nexus on the seller must be limited to solicitation or other sales activity in order to be consistent with the "bright-line" rule of *Quill*, 504 U.S. at 315, and *Bellas Hess*, 386 U.S. at 758. That rule requires an out-of-state vendor to have some "physical presence in the taxing State" to be subject to use or sales tax on its sales of goods in the state. *Quill*, 504 U.S. at 314. *Scripto* and *Tyler Pipe* effectively close a loophole, preventing "a stampede of tax avoidance" that could occur if mail-order companies could classify their in-state sales forces as independent contractors. *Scripto*, 362 U.S. at 211.

The court below held that the activities that "are significantly associated with" a mail-order vendor's "ability to establish and maintain a market in th[e]

state *for the sales*," *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted; emphasis added), include activities like service provision, which takes place post-sale and the availability of which merely makes the product more attractive. *See* Pet. App. 21a-22a. But service provision is taxed separately. Indeed, it is undisputed in this case that Dell paid New Mexico tax on BancTec's behalf for the value of the services BancTec provided. *See id.* at 6a, 37a. A third party's provision of non-sales-related activity cannot, therefore, form a constitutional basis for taxing *the sales* of an out-of-state vendor.

Second, and relatedly, the New Mexico court's loose standard significantly undermines the bright-line standard that *Quill* expressly chose to retain. *See* 504 U.S. at 315-16. Indeed, the Department's call for an "intensely fact-based" "case-by-case" review, Opp. 21 (internal quotation marks omitted), of a variety of factors that make up any given business relationship – the extent and nature of the activities, the degree of control one party exerts over another, the volume of services provided, and so forth – is precisely the type of inquiry this Court eschewed in *Quill*. This Court's standards under the Commerce Clause seek to promote "settled expectations" and to "foster[] investment" by mail- and Internet-order businesses. 504 U.S. at 316. By contrast, as the Department concedes, the decision below makes every business relationship that such a vendor undertakes subject to "intensely fact-based" scrutiny to determine whether it renders that vendor subject to taxation in the state where its partner is located. Opp. 19. This Court has consistently refused to sanction such uncertainty in such a vital part of the national economy.

Third, by subjecting Dell's sales to gross receipts tax on the basis of BancTec's non-sales activity, the court of appeals ignored this Court's further requirement that the relevant third-party activities be undertaken "on behalf of" the taxpayer. *Tyler Pipe*, 483 U.S. at 250 (internal quotation marks omitted). The court instead found BancTec's non-sales activities sufficient to subject Dell's sales to taxation because BancTec "'served an important need'" for Dell, and Dell "'benefitted financially from the sales of service contracts as well as the ability to have an outsourced repair service.'" Pet. App. 22a (quoting *Dell Catalog Sales, L.P. v. Commissioner of Revenue Servs.*, 834 A.2d 812, 822 (Conn. Super. Ct. 2003)). But these types of benefits are no different in kind from the benefits that any out-of-state vendor receives from the provision of in-state service by authorized service providers or from any of a number of relationships that a vendor might have with in-state suppliers, manufacturers, or other business partners. If such benefits are sufficient, a similar argument could be constructed for imposition of sales or use tax on practically any out-of-state vendor.

The Department seeks to bolster the court's holding by arguing that Dell exerted significant control over BancTec's activities. But the Department quotes primarily from the findings of the hearing officer, on which the court of appeals did not rely. *See, e.g.*, Opp. 5-6. Indeed, the court cited only three findings in support of its decision – that "the availability of in-home service was an important factor in establishing [Dell's] market for sales," that "[a]pproximately seventy-five percent of [Dell's] New Mexico customers purchased a BancTec service contract," and that BancTec technicians made "1,273 service

calls and installation visits to New Mexico customers during the audit period." Pet. App. 21a-22a (brackets and internal quotation marks omitted).

Even on their own terms, the hearing officer's findings do not support the Department's conclusion that BancTec acted on behalf of Dell rather than itself. Despite the Department's mischaracterization in both the Question Presented (at i) and throughout its brief (*e.g.*, at 1-2, 19), it is undisputed in this case that BancTec did *not* provide service under Dell's warranty with its customers. *See* Pet. App. 34a ("Neither Dell Products L.P. nor DCSLP had any obligation to provide on-site repair services to a customer who purchased a Dell computer from DCSLP."). Similarly, the Department has never contended, and the hearing officer did not find, that an agency relationship – the clearest instantiation of one acting "on behalf of" another – existed between Dell and BancTec. *See id.* at 36a-37a ("BancTec did not . . . have the authority to bind DCSLP to any legal obligations in New Mexico.").

Even if a relationship short of agency could result in a third party acting "on behalf of" an out-of-state seller within the meaning of *Tyler Pipe*, the record in the case – contrary to the Department's assertions – demonstrates that BancTec acted on behalf of no one but itself. The Department does not – and cannot – dispute that BancTec carried out its on-site repair activities pursuant to its individual contracts with *its own* customers who bought *BancTec*'s service. *See id.* at 38a.[2]

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[2] The Department states (at 4, 22) that BancTec's name did not appear in Dell's catalogs. The record shows, however, that those catalogs disclosed that on-site service would be provided by a third party and that each customer purchasing a BancTec

The Department cites (at 4-5) the "Service Call Procedures" that were set out in the agreements between BancTec and Dell. But those procedures were merely quality-assurance standards of a type that are routinely incorporated into arm's-length agreements and that Dell demands of third-party hardware and software producers whose products Dell sells. *See, e.g.*, Pet. App. 5a-6a; Hearing Tr. 158, 195-97 (testimony of BancTec representative noting that it was not "unusual" for marketing partners to establish standards to ensure that "our service . . . was . . . reputable and reliable"). Indeed, the record establishes that BancTec retained control over all aspects of its business, including personnel and scheduling decisions. *See* Dell C.A. Br. 10. Similarly, the fact that Dell Technical Support first fielded and tried to resolve customers' complaints has no bearing on the nexus issue. *See* Opp. 4. The assistance provided by Dell Technical Support (from locations outside of New Mexico) was available to all customers who were still under warranty, regardless of whether they had purchased a BancTec service contract. *See* Pet. App. 34a-35a. That customer assistance clearly would not create nexus in the absence of the BancTec relationship, and there is no principled reason why BancTec's fulfillment of its own obligation to its own customers after Dell Technical Support was unable to resolve a customer problem should change that outcome.

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contract received a copy of the contract. *See* Exh. K at 13 (Dell Feb. 1999 catalog) (submitted at Hearing Before Hearing Officer Margaret B. Alcock, *In re Protest of Dell Catalog Sales L.P.*, N.M. ID No. 02-416593-000 (Dec. 5, 2005) ("Hearing")).

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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